# THE LAW

RELATING TO THE

# CUSTODY OF INFANTS

INCLUDING

## FORMS AND PRECEDENTS

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# PREFACE TO THIRD EDITION

The general method of statement and arrangement of the preceding edition have been followed. New matter upon points deemed of interest and importance has been added. The citation of cases includes, it is believed, all the important English and American decisions to the date of publication. The appendix has been revised and enlarged with a view to furnishing a complete collection of forms and precedents applicable to every variety of case at law or in equity. Accuracy and thoroughness in every particular have been aimed at in the preparation of this volume.

L. H.

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# CHAPTER 1

## General Doctrines

§ 1. **Infancy.**—Infancy means the status of one who has not attained his majority, or full age of legal capacity, and is synonymous with minority and nonage. Full age, at common law, is twenty-one years,[1] and this age is computed to be completed on the first instant of the day preceding the twenty-first anniversary of birth.[2] A person below that age is, in legal designation, an infant or minor. The age of majority is the same, at the common law, for both sexes;[3] but female infants, under the statutes of a number of states, have an enlarged capacity to act at the age of eighteen years,[4] and, in some states, that age is made

[1] Co. Litt. 79a.

[2] Herbert *v.* Turball, 1 Kebl. 589; Anonymous, 1 Salk. 44; S. C., 1 Ld. Raym. 480; Fitzhugh *v.* Dennington, 6 Mod. 259; S. C., 2 Ld. Raym. 1094; Wrangham *v.* Hersey, 3 Wils. 274; In re Richardson, 2 Story, 571; S. C., Fed. Cas. 11,777; S. *v.* Clarke, 3 Harr. (Del.) 557; Wells *v.* Wells, 6 Ind. 447; Hamlin vs. Stevenson, 4 Dana (Ky.), 597; Bardwell *v.* Purrington, 107 Mass. 419; Ross *v.* Morrow, 85 Tex. 172; Linhart *v.* S., 33 Tex. App. 504; Phelan v. Douglass, 11 How. Pr. 193.

This doctrine as to the computation of time of majority twenty-four hours ahead of the attainment of the twenty-first year appears quite contrary to reason, but is probably too well established to be now discarded. Redf. Wills, 19.

[3] Waring *v.* Waring, 2 Bland (Md.), 673; Greenwood *v.* Greenwood, 28 Md. 369; Hussey *v.* Ryan, 64 Ib. 426, 437; Dent *v.* Cocke, 65 Ga. 400.

[4] In Maryland, probate guardianship of females ceases at eighteen years (Code P. G. L., art. 93, sec. 144) and a female over that age can execute a receipt or release (Ib. art. 79, secs. 1-10).

the period of majority.[1] The period of infancy is wholly a matter of positive law, the entire subject of the legal status of infants being fully under the control of the state or government.[2]

§ 2. **Governmental Control.**—The conception which underlies the policy of the common law governing the status of infants is that of the separate legal personality of the child. The individual and not, as under Roman law,[3] the family is the legal unit of society with which our law deals. From the very moment of birth, a child becomes a citizen, or subject of the government under whose jurisdiction born, entitled to the protection of that government.[4] The only limitations upon the governmental power are those resulting from the obligation towards the infant himself, not to infringe upon those constitutional guaranties and safeguards which are enacted for the security and protection of the person and property of all citizens.[5] Thus, the constitutional requirement, that no person shall be deprived of life, liberty or property without due process of law[6] operates as a limitation upon the general powers of the courts over

[1] See Sparhawk *v.* Buell, 9 Vt. 47, 79; Stevenson *v.* Westfall, 18 Ill. 209; Parker vs. Starr, 21 Neb. 680.

[2] U. S. *v.* Bainbridge, 1 Mason, 71, 78; S. C., Fed. Cas. 14,497; S. *v.* Clottu, 33 Ind. 409; Bennet *v.* Bennet, 18 N. J. Eq. 114.

[3] For a most interesting discussion of the *patria potestas* of the Roman law, see article in 8 Harv. L. Rev. 39. Under that system, the identity of the child was merged in that of the family, and the control of the father over the child was closely assimilated to that of the master over his slave. *Cf.* The Etna, 1 Ware, 462, 465, n. b; S. C., Fed. Cas. 4,542.

[4] In re Moore, 11 Ir. C. L. N. S. 1, 14; In re Connor, 16 Ib. 112, 124; The Etna, *supra;* Mercein *v.* P., 25 Wend. 64, 103; Exp. Crouse, 4 Whart. 9.

[5] U. S. *v.* Bainbridge, 1 Mason, 71, 79; S. C., Fed. Cas. 14,497; Shine *v.* Brown, 20 Ga. 375.

[6] Const. U. S., Amend. 5, 14.

the estates of infants[1] as well as a prohibition of any legislation by means of which a minor might be subjected to imprisonment or punishment for crime without the observance of all the regular formalities of criminal procedure.[2] On the other hand, statutes may authorize the detention of minors duly convicted of crime in special juvenile prisons or reformatories;[3] and, whenever such course is necessary or requisite to their moral and future welfare, the commitment of minors to houses of refuge and other juvenile asylums or institutions may be authorized by summary proceeding.[4] So also, the government may directly intervene or determine in matters relating to the morals, health or education of minors. Under this head are classed provisions prohibiting the sale or supply of liquor to minors, with or without the parental consent;[5] regulating the kinds of employment[6] and hours of labor[7] of minors; prohibiting their admission to certain places, *e. g.*, drinking saloons.[8]

§ 3. **How Exercised.**—The exercise of the power and duty of the government to secure to infants its protection and care may take the shape provisions of three sorts:—

1. General regulations, in the nature of disabilities and exemptions, embracing all matters relating to the civic rights and liabilities of infants and the remedies of and against them; such as the capacity to contract, to sue and be sued, responsibility for torts and crimes,

[1] Jenkins *v.* Whyte, 62 Md. 427, 433.
[2] *Infra*, § 97.
[3] Ib.
[4] *Infra*, § 99.
[5] S. *v.* Clottu, 33 Ind. 409; S. *v.* Lawrence, 97 N. C. 492.
[6] P. *v.* Ewer, 141 N. Y. 129.
[7] C. *v.* Hamilton, 120 Mass. 383.
[8] S. *v.* Austin, 114 N. C. 855; P. *v.* Japinga, 115 Mich. 222.

and embracing also such matters as the capacity to hold public office, or execute a private trust, the capacity to execute a deed or will.

2. Specific regulations and prohibitions, designed for the protection of their morals and health and the security of their persons, such as those relating to the sale of liquors or dangerous weapons, hours of labor and kinds of employment, admission to places of entertainment or amusement, the age within which a female cannot consent to sexual commerce.

3. Regulations appointing certain persons, called guardians, upon whom government casts the function of acting as its agent in the immediate care of the person, or property, or both, of the infants thus provided for.

§ 4. **Guardianship.**—A guardian is one entrusted with the interests of another who is disqualified or incapacitated from acting for himself and who is known as the ward. The term guardianship usually applies to the case of infants. The fundamental idea upon which the entire legal conception of such guardianship rests is, that it is a mere agency or instrumentality of government for the purpose of according to infants the protection of its laws. In true legal conception, a guardian is simply the agent or trustee of the government. His authority is that delegated by the government; his powers and functions are limited and defined by the nature and purpose of the authority thus delegated; and in and for their exercise he is entirely subject and accountable to it. The legal status of a guardian is purely that of a trustee—his trust differing from other trusts only in this respect, that it is "of all trusts the most sacred."[1]

§ 5. **Kinds Of Guardianship.**—Guardianship of infants embraces the two functions of care of the

[1] Wellesley v. Wellesley, 2 Bligh N. S. 124, 128.

person and care of the estate. These may be entrusted to different persons, but are ordinarily entrusted to the same person. A general appointment as guardian implies a charge or the care and custody of the person as well as of the property of the ward;[1] and, while a person of unsound mind remains an infant, the ordinary guardian is the proper custodian of his person and his estate.[2]

The only kinds of guardianship recognized in the United States are guardianship by nature, or that of parents, testamentary guardianship, or that by appointment by the deed or will of the father, and guardianship by judicial appointment, which is exercised by courts of chancery and probate courts. Guardianship in chivalry, in socage, by election and by custom are all now either abolished or obsolete.

§ 6. **Guardianship Of Parents.**—The father, upon his death the mother,[3] is the "guardian by nature" of all the infant children. They are the only natural guardians. The next of kin do not succeed them.[4] According to the strict common law, in England, only the heir-apparent could be the subject of this species of guardianship; but, as under our laws all children inherit equally, the guardianship by nature is held to include all the children. It extends to the custody of the person, but not of the estate.[5] Guardianship for

[1]Burger *v.* Frakes, 67 Iowa, 460.

[2]Franklyn *v.* Sprague, 121 U. S. 215, 229.

[3]In re Van Houten, 3 N. J. Eq. 220; P. *v.* Wilcox, 22 Barb. 178, 184; Dedham *v.* Natick, 16 Mass. 135, 140; Lefever *v.* Lefever, 6 Md. 472; Ohio R. R. *v.* Tindall, 13 Ind. 366; Striplin *v.* Ware, 36 Ala. 87; S. *v.* Reuff, 29 W. Va. 751; Hammond *v.* Cobbett, 50 N. H. 501; Fulton *v* Fulton, 52 O. St. 229.

[4]Co. Litt. 88 b, Harg. n. 67.

[5]Hyde *v.* Stone, 7 Wend. 354; Fonda *v.* Van Horn, 15 Ib. 631; Kline *v.* Beebe, 6 Conn. 494; Miles *v.* Boyden, 3 Pick. 213; Linton *v.* Walker, 8 Flor. 144; Isaacs *v.* Boyd, 5 Porter (Ala.), 388; Alston *v.* Alston, 34 Ala. 15; Power *v.* Harlow, 57 Mich. 107; Sherwood *v.* Neal, 41 Mo. App. 416; Bedford *v.* Bedford. 136 Ill. 354.

nurture, which determined when the infant arrived at the age of fourteen years and applied only to the younger children who were not heirs-apparent, but was, in other respects, similar to guardianship by nature, may be considered obsolete, or, at least, merged in effect in the higher and more durable office of guardian by nature.[1]

§ 7. **Testamentary Guardians.** — Testamentary guardians, otherwise known as guardians by statute, are appointed by virtue of stat. 12 Car. 2, c. 24, passed 1660, which has been generally adopted in the United States and provides, that a father, whether an infant or of full age, may, by deed or will, dispose of the custody or tuition of his child, either born or unborn, to any person or persons he may select, in such manner as shall be effectual against any person claiming as guardian by any other title.[2]

§ 8. **Chancery Guardians.**—It is a well-established part of the jurisdiction of courts of chancery, which are, generally speaking, the judicial conservators of the interests of infants, to appoint guardians of infants, when necessary for the care of their person or estate, either when there is no other guardian, or when the natural or specially appointed guardian appears to be guilty of misconduct or otherwise unfit properly to fulfil his trust.[3] It is a rule, one not, however, of universal application, that in order for the jurisdiction to arise, there should be a suit pending relative to the infant, and that, in order to enable the court to exercise its jurisdiction, there should be some property of the infant in its power or of which it can lay hold.[4]

[1] 2 Kent Comm. 223.
[2] *Infra*, §§ 64-65.
[3] *Infra*, § 28.
[4] *Infra*, § 24.

§ 9. **Probate Guardians.**—Probate guardians are guardians appointed by special local tribunals, known as orphans', ordinary's, surrogate or probate courts, generally over the person and estate, sometimes over only the one, of orphans or other classes of children designated by statute, whose functions, powers and duties are regulated by local statutes.[1]

§ 10. **Powers How Derived.**—Even the natural guardians are legally considered the appointees of the government, the only difference, in this respect, between them and other guardians being, that the latter are expressly appointed when the occasion for them arises or is expected to arise, while the former are appointed, as it were, by a general rule of law, or, as it is said, "by the course of the law the wardship is cast upon them."[2] The law devolves the guardianship upon them, not so much on account of their natural right, as because the interests of the child and the good of the public will be thereby promoted.[3] *A fortiori*, does this apply to other guardians. "Guardianships are granted for the benefit of the infant and not of the guardian."[4] No such thing as a "vested right" therein is recognized in law.[5]

§ 11. **Authority Not Assignable.**—Guardians cannot divest themselves of the duties and obligations cast upon them by law; the trust confided to them cannot be made matter of bargain. Contracts or agreements entered into by parents to divest themselves of the care, custody or control of their infant children

[1] *Infra*, § 63.

[2] Com. Dig., Guardian, D.

[3] Exp. Crouse, 4 Whart. 9; Striplin *v.* Ware, 36 Ala. 87, 89.

[4] Shine *v.* Brown, 20 Ga. 375, 378.

[5] U. S. *v.* Green, 3 Mason, 482; S. C., Fed. Cas. 15,256; Shine *v.* Brown, *supra*; Giles *v.* Giles, 30 Neb. 624; S. *v.* Schroeder, 37 Ib. 571; Nugent *v.* Powell, 4 Wyom. 173.

are against public policy and void.[1] It is immaterial, that the agreement was made in another country under the laws of which it is valid:[2] the *lex fori* governs in such cases.[3] Such contracts must, however, be distinguished from contracts for adoption or the like made for the benefit of children.[4]

§ 12. **Same Subject.**—The principle that forbids an assignment of the care and custody of an infant by its parents applies, *a fortiori*, to probate and other specially appointed guardians and has in such cases been upheld with great strictness. It was so held in regard to guardians in socage.[5] In the case of testamentary guardians, it has, from very early times, been held, that they can not even resign their trust;[6] and Chancellor Kent held, that chancery has power to discharge a probate guardian as well as any other kind of guardian, but, having once accepted the trust, the guardian should not be permitted to lay it down, unless for very special reasons.[7] So where one person agreed to resign his guardianship, in order that another person might be appointed in his place, the agreement was held void.[8]

[1] Hope *v.* Hope, 26 L. J. Ch. 417, 424; Vansittart *v.* Vansittart, 27 Ib. 289; Walrond *v.* Walrond, 28 Ib. 97, 101; Torrington *v.* Norwich, 21 Conn. 543; S. *v.* Baldwin, 5 N. J. Eq. 454; Albert *v.* Perry, 14 Ib. 540; S. *v.* Libbey, 44 N. H. 321; Washaw *v.* Gamble, 50 Ark. 351; In re Lewis, 88 N. C. 31; In re Scarritt, 76 Misso. 565; Weir *v.* Marley, 99 Ib. 484.

[2] Hope *v.* Hope, *supra.*

[3] *Infra*, § 70.

[4] *Infra*, § 16.

[5] Co. Litt. 88b, Harg. n. 13; Bedell *v.* Constable, Vaugh. 177; Shaftsbury *v.* Shaftsbury, Gilb. Eq. R. 172, 177.

[6] Spencer *v.* Earl of Chesterfield, Ambler, 146; Balch *v.* Smith, 12 N. H. 437.

[7] Exp. Crumb, 2 Johns Ch. 439.

[8] Cunningham *v.* Cunningham, 18 B. Monr. (Ky.) 19, 24.

The modern tendency is, to relax the strict rule forbidding a guardian to resign his appointment. No good can ordinarily be accomplished by compelling a person to continue to serve as guardian. The strictly correct method of proceeding, at common law, if a guardian desires to be relieved from his trust, would be to remove him.[1]

§ 13. **Transfer Of Custody.**—While a mere agreement stipulating for the assignment or disposal of the custody of a child is void, yet, when such an agreement has been entered into and the child's custody actually surrendered in pursuance thereof, the courts may refuse to allow the legal custodian to reclaim the custody upon equitable grounds connected with the welfare of the child.

In *C. v. McKeagy*,[2] which arose upon a writ of *habeas corpus* directed to the superintendent of the Philadelphia House of Refuge, a juvenile reformatory institution, it was held, that in the absence of a statute authorizing such proceeding, the mere placing by a father of his minor son in such an institution, under a pledge to submit him to its discipline and regulations, can not operate to transfer the custody, and the child was discharged from the custody of the respondent.

In *C. v. St. John's Orphan Asylum*,[3] it appeared that the respondent was an institution, incorporated under the laws of Pennsylvania, with power, among other things, "to receive any orphan child or children and such other children as may be deprived of one of their parents, to be bound out to such person or persons

[1] Young *v.* Lorain, 11 Ill. 624.

In Maryland, it is expressly provided, that upon application in writing of a guardian appointed by it, an orphans' court may revoke his appointment. Code P. G. L., art. 93, sec. 186.

[2] 1 Ashm. (Pa.) 248.

[3] 9 Phila. 571.

and in such manner as the court may direct," and that the widowed mother of children whose custody was in question had, by instrument under seal, stipulated with the respondent, that she did "surrender and yield up the said children to St. John's Orphan Asylum, to be provided for, instructed and bound out by said corporation to such person or persons and for such term of years, within lawful age, as to it shall seem proper." It was held, that under these circumstances, the mother could not reclaim the custody of the children, so long as their interests were subserved by their remaining in the institution, because her act was an abandonment of them.

In *Dumain v. Gwynne*,[1] it appeared, that the father was a convict felon and that the mother, being in destitute circumstances, had entered into a written agreement with the managers of a juvenile institution, whereby, in consideration of the promise on the part of the managers to procure a suitable permanent home in a private family for her children, she "gave up" the children to them. They were placed in a suitable home, and upon the father's release from prison, the parents sought to regain custody. Under the Massachusetts law, the custody of the children, upon the imprisonment of the father devolved upon the mother, who could assent to a decree for their adoption. The contract, fairly made and suitable, was upheld as a reasonable arrangement, according substantially with what would have been the result under the strictly legal proceeding, and the children were allowed to remain in the home provided for them.

*C. v. Gilkeson*[2] is a well-considered case, frequently cited and approved. Some six years prior to the suit, a *habeas corpus* by a daughter to be discharged from her father's custody, both parents, by contract under

[1] 10 Allen, 270.
[2] 1 Phila. 194.

seal, had transferred the child's custody to her uncle and aunt, who agreed, by the same writing, to adopt her. The contract, though not of such a character that it could be enforced against the child, was performed by the uncle and aunt and sanctioned by the father, until the child had grown from nine to fifteen years. At the time of suit, her mother and uncle were dead; the father had recently obtained possession of her and insisted on retaining the custody, although the child preferred remaining with her aunt. The court observed, that the parental authority had been solemnly renounced for six years, and the child had attained the age of fifteen years. She had become estranged from the customs and government of her father's house, had formed new habits and views and become accustomed to different associations and modes of living; and now, the father, disregarding his agreement and the wishes and comfort of his child, was seeking to re-establish the parental authority. "We should be glad, if he could effect it by the influence of paternal kindness and consistently with honesty; we dislike to see the paternal and filial relation severed and should love to see the broken bond reunited; but it can not well be done by the enforcement of it as a legal right. The father himself broke the bond and the law will not help him now to mend it; he emancipated his daughter by his own solemn act and all restraint upon him by her is now improper. We must, therefore, discharge her from all restraint and leave her to elect with whom she will go."

§ 14. **Same Subject.**—Some cases hold, that the custody can not be abandoned for the same reason that prohibits a formal assignment or transfer of the custody or guardianship,[1] and a few cases have taken extreme ground in permitting parents to reclaim cus-

[1] Johnson *v.* Terry, 34 Conn. 259; Cook *v.* Bybee, 24 Tex. 278; Mayne *v.* Baldwin, 5 N. J. Eq. 454.

tody after it had been fully relinquished.[1] The more just and reasonable view is, that where no other element is involved than a mere transfer of custody, the guardian is not necessarily barred from reclaiming it; but the agreement to transfer the custody is always an element to be taken into consideration in the determination of a suit in which the guardian seeks to reclaim such custody.[2] In other words, though a parent or other guardian cannot lawfully assign the care and custody of his infant child or ward, he may relinquish them, and the courts will then ordinarily not allow him to reclaim the child. Such relinquishment may be by agreement of transfer,[3] or by abandonment[4] or other course of conduct. The reasons for which a return to the custody of the parent or other guardian is denied are based upon considerations connected with the best interests of the child[5] and considerations of justice to the persons who have undertaken its care.[6]

§ 15. **Same Subject.**—It is a fundamental rule, that whenever a guardian's claim to the custody is inconsistent with the welfare of the ward—the thing intended to be secured by giving him the custody—such claim should be denied.[7] Hence, whether there is a written or other express agreement, or no agreement, if a parent or other legal custodian, by any course of conduct, has permitted a state of things to

[1] S. *v.* Richardson, 40 N. H. 272 (virtually overruled in S. *v.* Libbey, 44 Ib. 321 and S. *v.* Barrett, 45 Ib. 15); Rust *v.* Vanvacter, 9 W. Va. 600 (virtually overruled in Green *v.* Campbell, 35 Ib. 689). *Cf.* In re Coram, 25 N. B. 504.

[2] Fullilove *v.* Banks, 62 Miss. 11.

[3] Curtis *v.* Curtis, 5 Gray, 535.

[4] Brinster *v.* Compton, 68 Ala. 299.

[5] *Infra*, § 15.

[6] *Infra*, § 16.

[7] *Infra*, § 41.

arise that cannot be altered without risking the happiness and interest of his charge, he will not be permitted to reclaim the custody which has thus become transferred to another person. Stated in broad terms, according to the reasoning and judgments of various tribunals in numerous cases, it may be said now to be the established rule, that whenever, through the act or sufferance of the legal custodian, the custody has come to be in a third party, the courts will not, at the instance of the parent or other guardian, interpose to restore the custody to him, thus breaking up the new ties that the infant has been allowed to form, if a change of custody would be disadvantageous to the infant.[1]

The view, once strongly entertained, that the father, in a controversy over the custody of the children with the mother, was entitled to an award of the custody by virtue of some supposed inherent superior right no longer prevails. In fact, it is now well recognized, that in certain cases, other things being equal, the mother is in a superior position in regard to a claim to the custody of the children.[2] Cases, therefore, of contests between parents as to the custody of the children are not generally deemed to present questions of much difficulty or delicacy. An award to one parent, having an at least equal natural interest with the other, can give rise to no scruple as to any disregard of natural claims. Cases of most frequent occurrence and comparative difficulty and delicacy are those of

[1] U. S. *v.* Sauvage, 91 Fed. R. 190; Legate *v.* Legate, 87 Tex. 428; Ellis *v.* Jessup, 11 Bush (Ky.), 403; Merritt *v.* Swimley, 82 Va. 433; Richards *v.* Collins, 45 N. J. Eq. 283; Sheers *v.* Stein, 75 Wis. 44; Bonnett *v.* Bonnett, 61 Iowa, 199; In re Gates, 95 Cal. 461; Spears *v.* Snell, 74 N. C. 210; Pool *v.* Gott, 14 L. R. 269; Drummond *v.* Ashton, 8 W. N. C. 563; C. *v.* Adams, 16 Phila. 516; P. *v.* Erbert, 17 Abb. Pr. 395; In re Lesslier, Ib. n; In re McKain, Ib. n.

[2] *Infra*, § 43.

contests between parents or guardians of infant children and third persons. The rulings and views of courts in the settlement of such controversies have been by no means at all times uniform; there have been great differences and conflicts of ruling, and it would be useless to attempt to reconcile the decisions of different courts or, sometimes, even decisions of the same court: but the statement is fully warranted, that the courts throughout the United States now evince a decided tendency in such cases to disregard any merely technical claims of parents or guardians.[1] When the taking of a child from the custody of a third person would involve the severance of ties of affection, or if, in any way, it appears or is to be apprehended, that the child would be injured or prejudiced by the change, it is not difficult for the court to determine, in accordance with the well-established doctrine above stated, that there should be no change, no breaking-up of the child's ties and associations. Whether, on the whole, the child would be actually prejudiced by a change of custody is not, however, in every case, apparent or ascertainable. In cases where the parent or other legal custodian seeks to regain the possession of a child from a third person, it may appear, that there is no ground whatever for supposing, that a restoration to the custody of the claimant would work any harm to the child. In such cases, American courts have deemed it the safe and sound course, "to let well enough alone." When courts have satisfied themselves, that a child's surroundings are suitable and safe, and the proposed change is one that does not promise a better life or to be conducive to the welfare of the child, the custody should not be changed: experiments should not be tried in such cases: if a change is made, it should be because it

[1] *Infra*, §§ 44-46.

clearly appears, that the interests and welfare of the child necessitate the change.[1]

§ 16. **Same Subject.**—Apart from the consideration of the weight to be given to the natural and equitable claims, more particularly of parents, and the paramount consideration of the best interests of the child, the interest of the person with whom the child has been placed is always to be considered.[2] While a parent or guardian can not at will divest himself of his obligations or make the possession of his charge matter of bargain, yet when circumstances arise by reason of which a parent is disabled from properly rearing his child in his own home and under his own care, the placing of the child in a suitable home or custody is a proper fulfilment of every obligation, and an undertaking, in consideration of the faithful bestowal of parental care, to leave the persons assuming charge of the child in undisturbed possession violates no policy of the law. It is now well settled, that contracts for the adoption of children, or to leave them a legacy in consideration of the relinquishment of their custody to the promisor, may be enforced both at law and in equity.[3] Tendency to lay stress upon the mere illegality of an agreement to transfer or assign the custody has greatly weakened. When persons undertake in good faith, without legal obligation or motive of gain, to maintain a child as their own, justice and sound policy require, that their feelings and interests should not be disregarded before the law. They should not be made to suffer disap-

[1] Chapsky *v.* Wood, 26 Kans. 650; P. *v.* Porter, 23 Ill. App. 196, 199; Green *v.* Campbell, 35 W. Va. 698; Stringfellow *v.* Somerville, 95 Va. 701.

[2] In re Murphy, 12 How. Pr. 513.

[3] Godine *v.* Kidd, 64 Hun, 585; Gates *v.* Gates, 34 N. Y. App. Div. 608; Enders *v.* Enders, 164 Pa. St. 266; Healey *v.* Simpson, 113 Misso. 340.

pointment and sorrow in direct consequence of the exercise of kindness and devotion, and the opportunities of obtaining the best care for children unfortunately situated should not be diminished through the natural unwillingness of those prepared to expend care and affection to risk the danger of a painful separation. The view, that arrangements of the kind in question should be deemed mutually binding is founded in reason and justice and supported by well-considered cases.[1] Even where the child is too young or has been in its adoptive home too short a while to be itself subject to be affected in feeling by a separation, the custody, for the reasons above stated, should not be changed.[2]

§ 17. **Same Subject.**—The principle, that there should be no change of custody, if the new relations which the child has contracted are such, that restoration to the parental custody would be a disadvantage is of general application. It is not necessary, that there should have been any misconduct or fault on the part of the parent, or that the arrangement under which the child has made its home with strangers should have been entered into with his consent. *Exp. O'Neal*[3] arose upon a petition for the writ of *habeas corpus* by the father of a female child, aged nine years. When about five years of age, she had been placed, after the mother's death, in an asylum for orphans, at Salem, Massachusetts. The father, whose business, was that of a seaman, was then upon a distant voyage. Shortly afterwards, with the assent of the managers of the institution, who supposed, that the child had no father living, she was taken by the respondents, a man and his wife, who had no children,

[1] Chapsky *v.* Wood, 26 Kans. 650; P. *v.* Porter, 23 Ill. App. 196; Anderson *v.* Young, 32 S. E. Rep. 448.

[2] Green *v.* Campbell, 35 W. Va. 698.

[3] 3 Am. L. Rev. 578.

to be provided for and educated as their own. Since that time, they had furnished the child with a home in every way suitable, and had paid every attention to her comfort and education. Upon the return of the father, he sought for his child, found her and instituted this proceeding. The case was decided by Judge Hoar, of the Supreme Judicial Court of Massachusetts, five of whose judges were consulted by him and concurred in the opinion. The child was restored to the custody of the respondents. The ground taken was, that if, owing to circumstances of misfortune, the child had formed new relations in life, which could not be severed without injury to it, the father should not be permitted to claim the custody. The same principle, it was observed, would apply, if the father became insane, or if the child had been nurtured in a warm climate, and it was proposed to remove it suddenly to a different climate: "a human being can not be treated like a piece of property."

§ 18. **Remarriage Of Mother.**—The mother's claim to the services of her infant children is doubtful;[1] but, upon the death of the father, she becomes the natural guardian of the children,[2] and is ordinarily appointed probate guardian, if they have property,[3] and is also sometimes authorized to appoint a testamentary guardian.[4] Remarriage does not necessarily render her ineligible for the guardianship,[5] nor affect her natural claims to the society and custody of her

[1] Keller *v.* Donnelly, 5 Md. 211; Furman *v.* Van Sise, 56 N. Y. 435; Hammond *v.* Cobbett, 50 N. H. 501; Worcester *v.* Marchant, 14 Pick. 510; Hollingsworth *v.* Swedenborg, 49 Ind. 378; Whitehead *v.* St. Louis R. R., 26 Mo. App. 60.

[2] *Supra*, § 6.

[3] As, in Maryland, under Code P. G. L., art. 93, sec. 146. *Cf. Ib.* secs. 179, 183-4.

[4] *Infra*, § 64.

[5] In re X, 1899, 1 Ch. 526; Leavel *v.* Bettis, 3 Bush (Ky.), 74; Cotton *v.* Wolf, 14 Ib. 238; Carlisle *v.* Tuttle, 30 Ala. 613.

children.[1] The custody must, in no event, be withheld from the mother, if the child's interests would thereby suffer. The fact of remarriage may become an element, to be taken into consideration, in determining, with a view to the best interests of the child, whether or not the mother's home is a suitable one;[2] but this is a matter that may bear with at least equal weight in the case of a remarriage of the father. In view of the modern tendency to disregard merely technical considerations in cases involving the custody of infant children and of the effect of statutory modifications and social changes upon the status of married women,[3] the circumstance of remarriage would seem entitled to slight consideration in opposition to the mother's claim. Even where a different person is appointed guardian, the technical consideration, that such appointment creates him legal custodian of the ward,[4] yields to the controlling consideration of the child's welfare,[5] and the child must not ordinarily be removed from the mother's custody.[6]

*Foster v. Alston*[7] furnishes a strong illustration. Two children were forcibly taken from the possession of the legal custodian, the testamentary guardian, by the mother. It appeared, upon the hearing of the application of the guardian to have the children restored to him by *habeas corpus*, that the interests and inclinations of the wards, who were of the ages of nine and ten years, would be best subserved by allowing them to remain with the mother. They

[1] Armstrong v. Strong, 9 Gratt. (Va.) 102; Perkins v. Finnegan, 105 Mass. 501.

[2] Spears v. Snell, 74 N. C. 210, 216.

[3] Nolan v. Traber, 49 Md. 460.

[4] *Infra*, § 66.

[5] *Infra*, § 67.

[6] Talbot v. Earl of Shrewsbury, 4 My. & Cr. 672.

[7] 6 How. (Miss.) 406.

were, accordingly, placed in her custody, although it did not appear, that the guardian had, in any way, abused his trust, or that he was incompetent to discharge it.

§ 19. **Emancipation.**—The term "emancipation," in a general sense, when applied to infants, denotes a relinquishment of parental control. It is principally used, in a more restricted, and perhaps proper sense, to denote a relinquishment of claim to the child's earnings. It lies within the power of the parent to relinquish his or her claim to the child's earnings,[1] during minority or for a shorter period,[2] and such emancipation may be by express stipulation,[3] by tacit permission,[4] or by a course of conduct, such as turning a child adrift to shift for itself.[5] There may be a relinquishment of claim to the child's services and earnings without any relinquishment of parental control in other respects. A father, in insolvent circumstances, has a full right to "emancipate" his child, to the extent of relinquishing his claim to the latter's earnings, and thus withdraw the fruits of the child's labor and industry from the reach of the former's creditors. The courts have adopted a liberal rule in upholding arrangements having this end in view as against claims of creditors seeking satisfaction of

[1] McDaniel *v.* Parrish, 4 App. D. C. 213, 219.

[2] Ib.

[3] Ziegler *v.* Fallon, 28 Mo. App. 295.

[4] Whiting *v.* Earle, 3 Pick. 201; Cloud *v.* Hamilton, 11 Humph. (Tenn.) 104; Campbell *v.* Campbell, 11 N. J. Eq. 268; Ream *v.* Watkins, 27 Misso. 516.

[5] The Etna, 1 Ware, 462; S. C., Fed. Cas. 4,542; Canovar *v.* Cooper, 3 Barb. 115; Stansbury *v.* Bertron, 7 W. & S. (Pa.) 362; Gary *v.* James, 4 Desaus. (S. C.) 185; Wodell *v.* Coggeshall, 2 Metc. 89; McCarthy *v.* Boston R. R., 148 Mass. 550; Everett *v.* Sherfey, 1 Iowa, 356; Clay *v.* Shirley, 65 N. H. 644; Nugent *v.* Powell, 4 Wyom. 173; Orneville *v.* Glenburn, 70 Me. 353; Farrell *v.* Farrell, 3 Houst. (Del.) 633.

demands against the parent by the somewhat questionable method of levying upon the proceeds of the child's labor. It is not necessary, in order to render the emancipation in such cases valid, that there should be any breaking-up of family ties or any relaxation of the parental care and control: parent and child may continue together in the uninterrupted fulfilment and enjoyment of the mutual benefits and obligations arising out of the relation and the parent may yet have yielded up his interest in the child's earnings.[1] An attempt to render a child's industry and labor unavailable as "assets" of the father's estate stands upon a different footing from an ordinary conveyance or disposal of property. The question of "consideration" or of intent to hinder creditors does not arise.[2]

§ 20. **Marriage.**—By marriage an infant becomes discharged, or "emancipated," from subjection to the custody or control of his or her parent or specially appointed guardian. The marriage of a female,[3] capable of contracting a valid marriage, puts an end to such custody and control as being inconsistent with the rights of the husband, who, by virtue of the marital relation, becomes "the guardian of the wife."[4] The marriage of a male infant has the like effect,[5] because it is essential to the fulfilment of his marital obligations, that he should have control over his own actions and be entitled to apply the proceeds of his

[1] McDaniel *v.* Parrish, *supra;* Clemens *v.* Brillhart, 17Neb. 335; Dierker *v.* Hess, 54 Misso. 246; Trapnell *v.* Conklyn, 37 W. Va. 242, 254; Donegan *v.* Davis, 66 Ala. 362; Rush *v.* Vought, 55 Pa. St. 437; Beaver *v.* Bare, 104 Ib. 58.

[2] Atwood *v.* Holcomb, 39 Conn. 270.

[3] C. *v.* Graham, 157 Mass. 73; Nicholson *v.* Wilborn, 13 Ga. 467; Aldrich *v.* Bennett, 63 N. H. 415; Holtz *v.* Dick, 42 O. St. 23 Porch *v.* Fries, 18 N. J. Eq. 204, 207.

[4] 2 Kent Comm. 181.

[5] C. *v.* Graham, *supra;* Nicholson *v.* Wilborn, *supra;* Sherburne *v.* Hartland, 37 Vt. 528; Dick *v.* Grissom, 1 Freem. Ch. (Miss.) 428.

labor to the support of his family.[1] Stat. 12 Car. 2, ch. 24[2] expressly authorizes an infant father to appoint a testamentary guardian for his child. The obligations of the married state are recognized and enforced by law, and these obligations are inconsistent with subjection to a guardian. The fact, that the marriage was against the consent of the parent or guardian is immaterial.[3] Below the age of fourteen years in males and twelve years in females, marriage is voidable at common law.[4] Statutes in a number of states prohibit the marriage of minors beyond those ages without the consent of the parent or guardian.[5] A mere prohibition of this kind subjects offenders to a penalty, but does not invalidate the marriage.[6] Marriage, however, does not affect the status of an infant to such extent as to make him lose the privilege of setting up the defense of infancy in cases where such defense is otherwise applicable.

§ 21. **Entering Public Service.**—When the duty which an infant owes as a citizen to the public becomes inconsistent therewith, the authority and control arising out of guardianship must cease. Hence, an infant is at liberty to contract an engagement to serve the government as a soldier or sailor, and in such case the authority of the guardian is suspended. The delegated authority of the guardian in such cases yields to the paramount authority of the government over its citizen, and, in the absence of a statutory

[1] Dick *v.* Grissom, *supra.*

[2] *Infra*, § 65.

[3] C. *v.* Graham, *supra;* Aldrich *v.* Bennett, *supra;* Holtz *v.* Dick, *supra. Contra:* White *v.* Henry, 24 Me. 531.

[4] 2 Kent Comm. 78.

[5] In Maryland, males must be above twenty-one years and females above sixteen years. Code P. G. L., art. 62, sec. 7. *Cf.* Ib., art. 27, sec. 199.

[6] Jones *v.* Jones, 45 Md. 144, 159.

provision to that effect, the consent of the parent or other guardian is immaterial.[1]

§ 22. **Summary.**—General rules can not be laid down for the determination of cases affecting the custody of infants. There can be no legal standard by which the courts must be governed. The custody of children can not be awarded according to any fixed and inflexible rules, as in cases where property rights are concerned:[2] the courts must judge according to the circumstances of particular cases:[3] the judgment must be essentially a discretionary judgment, one guided by views on social and domestic matters, absolutely incapable of being brought under legal rules and definitions.[4] The general result of the American cases may be characterized as an utter repudiation of the notion, that there can be such a thing as a proprietary right or interest in or to the custody of an infant. The terms "right" and "claim," when used in this connection, according to their proper meaning, virtually import the right or claim of the *child* to be in that custody or charge which will subserve *its* real interests.[5] The entire tendency of the American courts is, to put aside with an unsparing hand all technical objections and narrow contentions whereby it may be attempted to erect claims of supposed legal right, on a foundation of wrong to

[1] R. v. Rotherfield Grays, 1 B. & C. 345; R. v. Lytchet Matravers, 7 Ib. 226; In re Morrissey, 137 U. S. 157; U. S. v. Bainbridge, 1 Mason, 71; S. C., Fed. Cas. 14,497; Kelly v. Sprout, 97 Mass. 169; C. v. Gamble, 11 S. & R. 93; C. v. Morris, 1 Phila. 381; Johnson v. Dodd, 56 N. Y. 76; In re Disinger, 12 O. St. 256; Halliday v. Miller, 29 W. Va. 424.

[2] In re Blackburn, 41 Mo. App. 622, 628.

[3] *Infra*, § 34.

[4] Smart v. Smart, 1892, App. Cas. 425, 436.

[5] U. S. v. Green, 3 Mason, 482; S. C., Fed. Cas. 15,256; In re Gregg, 5 N. Y. Leg. Obs. 265, 267; Nugent v. Powell, 4 Wyom. 173.

persons who are a peculiar object of the solicitude and protecting care of the law.

The American courts have, from the earliest period, with certain exceptions, adopted the view, that in all cases affecting the custody of infants, the determination, based upon a consideration of the facts and circumstances of each particular case, must be in accordance with the demands of actual justice and right. The English courts, at one period, adopted a system of deciding questions of custody according to certain fixed, general rules, irrespective of the true merits of specific cases. The result was a line of adjudications shocking to the moral sense, and legislative intervention became necessary to remedy what, according to the American view, was a series of judicial errors.[1] According to the present English[2] as well as American[3] view, in the determination of every case affecting the custody of a child, the child's welfare is the paramount consideration.

[1] *Infra*, § 37.
[2] *Infra*, § 38.
[3] *Infra*, § 41.

## CHAPTER 2

### CHANCERY JURISDICTION

§ 23. **General Nature.**—Courts of chancery, from the earliest times, have exercised a jurisdiction in the matter of the custody of infants that, by reason of the peculiar *constitution* of these courts, has operated as a far more liberal and efficacious remedy than the courts of common law, at least according to the English doctrine, could afford. Strictly speaking, the *principles* that underlie the action of the two classes of tribunals are the same;[1] but this has not been kept clearly in view in all cases.[2]

The jurisdiction of the courts of chancery over the person and property of infants has a just and rightful foundation in the prerogative or power of the crown or government, flowing from its general power and duty as *parens patriæ*, to protect those who have no other lawful protector. It has been well said, that in every civilized state, such a superintendence and protective power does somewhere exist. If it is not found to exist elsewhere, it seems to be a just inference, from the known perogatives of the sovereign, as *parens patriæ*, in analogous cases, that it vests in the sovereign. Assuming this existence of power, the question, by whom and in what manner the authority should be exercised would not seem open to much controversy. Partaking, as it does, more of the nature of a judicial administration of rights and duties *in foro conscientiæ* than of strict executive authority, it

[1] In re Moore, 11 Ir. C. L. N. S. 1, 19.

[2] DeManneville v. DeManneville, 10 Ves. 52.

would naturally follow, *ea ratione*, that it should be exercised in the courts of chancery as a branch of the general jurisdiction originally confided to them. Accordingly, the doctrine now maintained is, that the general superintendence and protective jurisdiction exercised in chancery over the person and property of infants is a delegation of the rights and duties of the crown; that it belonged to the Court of Chancery in England, and was exercised by it from its first establishment; and that it is now vested in all courts exercising the same general jurisdiction.[1]

§ 24. **When Attaches.**—The jurisdiction in such cases is ample, effectual and far-reaching. By the very fact of the institution of a proceeding affecting the person or property of an infant, the court acquires jurisdiction, and the infant immediately becomes a ward of the court.[2] When the petition is once presented on the part of or in behalf of an infant, invoking the aid of chancery, the court will do what is for the benefit of the infant, regardless of the prayer;[3] and, pending the trial of a cause affecting its custody the child is, in legal contemplation, in the custody of the court and subject to its order, from day to day.[4] When an application is made to a court of common law to deliver up a child to a guardian or other applicant upon *habeas corpus*, if it appears, that there are proceedings in chancery, the court will decline to

[1] Co. Litt. 87 a, Harg. n. 70; Fonb. Eq, b. 2, pt. 2, ch. 2, § 1, n. a; 2 Story Eq. Jur. §§ 1328-34; Wellesley *v.* Duke of Beaufort, 2 Russ. 1; Wellesley *v.* Wellesley, 2 Bligh. N. S. 124; Woodruff *v.* Conley, 50 Ala. 304; Anonymous, 55 Ib. 428; Lee *v.* Lee, Ib. 590; Jones *v.* Stockett, 2 Bland (Md.), 409, 430; Corrie's Case. Ib. 488, 492; Helms *v.* Franciscus, Ib. 544; Cowls *v.* Cowls, 8 Ill. 435; Lynch *v.* Rotan, 39 Ib. 14; North Pacific Board *v.* Ah. Won, 18 Or. 339; S. *v.* Grisby, 48 Ark. 406; In re Knowack, 158 N. Y. 482.

[2] *Infra*, § 25.

[3] DeManneville *v.* DeManneville, 10 Ves. 52, 59.

[4] Joab *v.* Sheets, 99 Ind. 328, 334. *Cf. infra*, § 58.

entertain the suit,[1] and the chancery court may even enjoin or restrain proceedings at law by *habeas corpus*.[2]

As a general rule, courts of chancery interfere with the guardianship of infants only in cases where there is property to act upon;[3] but the jurisdiction to interpose merely for the protection of the person is well established.[4] The relief may take the form of the appointment of a guardian,[5] or of a restraining order or an injunction;[6] and the case may arise upon a mere petition,[7] or upon a formal bill.[8]

§ 25. **Wards In Chancery.**—In the more strict and limited sense of the term, a ward of chancery is a person who is under a guardian appointed by a court of chancery;[9] but, in all cases, where an infant, male or female, has by any suit or proceeding been brought before a court of chancery for the purpose of having the person or estate of such infant properly disposed of, such infant thereby becomes, until the attainment of full age, a ward of the court, and may be governed and protected accordingly, and no act can be done affecting the person, property or estate of

[1] Wellesley v. Wellesley, 2 Bligh N. S. 124, 142; In re De Angelis, 1 Edm. Sel. Cas. 476; In re Delano, 87 Mo. App. 185; In re Morgan, 117 Misso. 249.

[2] *Infra*, § 33.

[3] 2 Story Eq. Jur. § 1351, n. 4; Wellesley v. Duke of Beaufort, 2 Russ. 1, 21.

[4] In re Spence, 2 Phill. Ch. 247; Eyre v. Countess of Shaftesbury, 2 P. Wms. 102; Creuze v. Hunter, 2 Cox Ch. Cas. 241; Exp. Warner, 4 Bro. C. C. 101; In re McCullochs, 1 Dru 276; In re McGrath, 1893, 1 Ch. 143; Cowls v. Cowls, 8 Ill. 435; S. v. Grisby, 38 Ark. 406; Aymar v. Roff, 3 Johns. Ch. 49.

[5] *Infra*, § 26.

[6] *Infra*, § 33.

[7] Eyre v. Countess of Shaftesbury, *supra;* In re McCullochs, *supra;* S. v. Grisby, *supra.*

[8] S. v. Grisby, *supra;* Aymar v. Roff, *supra.*

[9] 2 Story Eq. Jur. § 1351.

such infant except under the express or implied direction of the court itself.[1] The jurisdiction may arise, where a direct application is made for the appointment, control or removal of a guardian[2] or upon applications for divorce;[3] or it may be exercised as incidental to the relief relating to the administration of the estate or a particular fund belonging to the infant;[4] or, a bill or petition may be filed for the express purpose of having an infant made a ward of court, in order to entitle it to the benefit of the court's protection.[5] In *Aymar v. Roff*,[6] decided by Chancellor Kent, where it appeared, that a man had married an infant under twelve years of age, who immediately afterwards declared her ignorance of the nature and consequences of the marriage and her dissent from it, the court, on a bill filed by her father and next friend, ordered her to be placed under its protection as a ward of the court, and forbade all conversation, intercourse or correspondence with her by the man, under pain of contempt.

§ 26. **Same Subject.**—Owing to the fact, that in the United States the matter of the appointment, removal and general supervision of guardians usually falls within the province of special local tribunals, which in England, until recent times, belonged exclusively to the equity courts, the occasions for the inter-

[1] Ib. § 1353; Eyre v. Countess of Shaftesbury, 2 P. Wms. 102; Butler v. Freeman, Ambler, 301; Johnstone v. Beattie, 10 Cl. & F. 42, 84; Stuart v. Bute, 9 H. L. Cas. 440; In re Gills, 24 L. R. Ir. 129; Helms v. Franciscus, 2 Bland (Md.), 544, 577; Jenkins v. Whyte, 62 Md. 427, 432; Rivers v. Durr, 46 Ala. 418; Cowls v. Cowls, 8 Ill. 435; Lloyd v. Kirkwood, 112 Ib. 329.

[2] *Infra*, §§ 26-32.

[3] *Infra*, § 71.

[4] In re Graham, L. R. 10 Eq. 530; DePereda v. DeMaucha, 19 Ch. D. 451; Brown v. Collins, 25 Ib. 56.

[5] In re McCullochs, 1 Dru. 276.

[6] 3 Johns Ch. 49.

position of chancery in matters of guardianship are here comparatively rare, and the almost jealous strictness with which the English courts laid hold of circumstances to constitute infants wards of chancery finds no great scope for application in American chancery jurisprudence. The jurisdiction is, however, freely and liberally exercised, whenever proper occasions arise, and jurisdiction conferred upon probate courts and other special tribunals in matters of guardianship does not at all take away or impair the jurisdiction of the equity courts.[1]

§ 27. **Authority Over Guardians.**—The courts of chancery exercise full authority, not only over guardians appointed by these courts themselves, but also over all other guardians, whether they be the natural guardians, or guardians appointed by probate tribunals, by deed or will, or by an express act of the legislature, and may control, or even remove or supersede such guardians, whenever the interests of the ward may require it.[2] Relief may ordinarily be afforded in such cases in a summary proceeding by petition by or on behalf of the ward, without a formal bill of complaint.[3] This jurisdiction is exercised, not because courts of equity do not fully recog-

[1] Lee *v.* Lee, 55 Ala. 590, 598; Bowls *v.* Dixon, 32 Ark. 92; Myrick *v.* Jacks, 33 Ib. 425; S. *v.* Grisby, 38 Ib. 406; In re Van Houten, 3 N. J. Eq. 220; Willis *v.* Fox, 25 Wis. 646; Union R. R *v.* Mayor, 71 Md. 283.

[2] 2 Story Eq. Jur. § 1339; Duke of Beaufort *v.* Berty, 1 P. Wms. 702; Eyre *v.* Countess of Shaftesbury, 2 Ib. 102, 107; Morgan *v.* Dillon, 9 Mod. 135; In re McCullochs, 1 Dru. 276; In re Van Houten, 3 N. J. Eq. 220; Lee *v.* Lee, 55 Ala. 590; Bowls *v.* Dixon, 32 Ark. 92; Corrie's Case, 2 Bland (Md.), 488; Hill *v.* Hill, 49 Md. 450; Westbrook *v.* Comstock, Walker Ch. (Mich.) 314; Lord *v.* Hough, 37 Cal. 657; Thomas *v.* Williams, 9 Flor. 289; In re Andrews, 1 Johns. Ch. 99; Exp. Crumb, 2 Ib. 439; P. *v.* Wilcox, 22 Barb. 178, 189; Wilcox *v.* Wilcox, 14 N. Y. 575.

[3] Disbrow *v.* Henshaw, 8 Cow. 349.

nize the validity of the appointments and the authority of guardians, but upon the broad principle, that courts of chancery exercise a general care and wardship over *all infants*, and this power is for the benefit of the child and is not to be defeated by any claim of title to the custody or guardianship, whether arising from natural relationship or express appointment under authority of law. Courts of chancery have from the earliest times exercised the power of regulating the conduct of all classes of guardians, or even removing or superseding them, holding them accountable as trustees. In some early English cases, doubts were expressed as to the right of the courts formally to *remove* a guardian not appointed by them, the view being, that such guardian could be merely superseded;[1] but such distinctions are matters touching the use of words, rather than of substantial, practical import, and the doctrine of these cases has not found general acceptance.[2]

If a child has been committed to the custody of a juvenile institution for care and guardianship, the authority of a court of chancery to control, remove or supersede the custodian is the same as that in the case of any other guardian or custodian.[3]

§ 28. **Same Subject.**—Courts of chancery are not at all bound to wait, until some misconduct or misbehavior has actually occurred on the part of parents or other guardians, but will interpose in advance of the commission of any act injurious to the welfare of infants by way of *preventive justice*, whenever they have reason to suspect, that guardians are about to act improperly.[4] They may act to the extent of regu-

[1] Foster *v.* Denny, 1 Ch. Cas. 237; Ingham *v.* Bickerdike, 6 Madd. 275; Exp. Mountfort, 15 Ves. 445.

[2] 2 Story Eq. Jur. § 1339, n. 2.

[3] In re Knowack, 158 N. Y. 482.

[4] Duke of Beaufort *v.* Berty, 1 P. Wms. 702, 705.

lating and directing the conduct of the guardian in relation to the custody and care of the infant, without proceeding to the extent of removing or superseding him.[1] They may pass restraining orders, prohibiting the removal of infants out of the jurisdiction, or prohibiting any other act or conduct deemed injurious to the interests of infants.[2] In cases where misconduct is of a grave nature, they may deprive guardians of the care and custody of the children and appoint proper persons to have the same.[3]

§ 29. **Same Subject.**—The English courts have, from the beginning held, that when it is found, that the guardian is guilty of gross ill-treatment or cruelty towards the children under his care, or that his habits are confirmedly immoral and depraved, or that he professes atheistical or irreligious principles,[4] or that his domestic associations are such as directly tend to the moral corruption and contamination of the children, or that he otherwise acts in a manner clearly injurious to their morals or interest—in every such case, chancery will interfere, to deprive him of the custody of the children and appoint a suitable person to take care of them and superintend their education.[5] The older English cases do not always take broad and liberal ground; in some of them the doctrine is asserted, that only extreme misconduct on the part of a father would justify an interference with the custody, even to the extent of placing the children in

[1] Roach *v.* Garvan, 1 Ves. Sr. 168; Shipbrook *v.* Hinchinbrook, 2 Dick. 547; In re Van Houten, 3 N. J. Eq. 220; Lee *v.* Lee, 55 Ala. 590.

[2] *Infra*, § 33.

[3] *Supra*, § 27.

[4] *Infra*, § 31.

[5] Exp. Warner, 4 Bro. C. C. 101; Whitfield *v.* Hales, 12 Ves. 492; Anonymous, 2 Sim. N. S. 54; Wellesley *v.* Duke of Beaufort, 2 Russ. 1; Wellsley *v.* Wellesley, 2 Bligh N. S. 124.

the care of the mother.[1] In modern English cases, the welfare of the infant is held to be the controlling consideration.[2]

§ 30. **Same Subject.**—The doctrine of the American cases is, that gross cruelty or ill-treatment, immorality or depravity of the most pronounced type, is not necessary to be shown, in order to warrant the interference of the courts of chancery. It is not absolutely necessary, that a clear and strong case of misconduct should be established against the parent or other guardian. The courts will take into consideration all the circumstances and render their decision on principles of justice and natural equity, having in view primarily the welfare of the child and attaching slight weight to mere technical considerations.[3] The cases in which courts of equity are called upon to act in regard to the question of custody are generally those in which there is an application for divorce of the parents, and, in this class of cases, the doctrine here stated has been well settled.[4] The instances in which the courts are called upon to act upon a bill filed for the sole purpose of having the matter of custody adjudicated are rare.[5] Where no proceeding for divorce is pending, the question of custody is ordinarily adjudicated in a proceeding by *habeas corpus* issuing out of a court of common law; but this writ may also issue out of chancery.[6]

§ 31. **Religious Education.**—The doctrine of the English courts of chancery is, that ordinarily children should be brought up in the religious faith of the

[1] Ball *v.* Ball, 2 Sim. 35; In re Fynn, 2 De G. & S. 457; In re Goldsworthy, L. R. 2 Q. B. D. 75.

[2] *Infra*, § 38.

[3] Cowls *v.* Cowls, 8 Ill. 435.

[4] *Infra*, § 74.

[5] S. *v.* Grisby, 38 Ark. 406; In re Knowack, 158 N. Y. 482.

[6] *Infra*, § 53.

father, and that proper orders may be passed to that effect;[1] but the welfare of the children must always be considered, and the rule is not so rigid as to be applied regardless of consequences to them.[2] The English courts interfere to a considerable extent in matters of religious education and training and have not hesitated to declare impiety and irreligion causes for removing children from the custody of their parents, upon the ground, that an atheistical or irreligious education tends to injure the future prospects and social standing of a child.[3] The American doctrine is, that the courts have no jurisdiction in the matter of religious education and training and that no one should be subjected to any disability for his profession of any particular form of religion, or even for rejecting the generally accepted teachings of natural religion: as it has been tersely put, "the law does not profess to know what is right belief."[4] A child should not be removed from an otherwise proper and beneficial custody on account of the religious belief or want of belief of the custodian, nor on account of any supposed danger, that the child will become estranged from the parental faith.[5] Yet, in the selection of a custodian, care should be exercised, whenever practicable, to guard against the estrangement of children from the parental faith.[6]

[1] Talbot *v.* Earl of Shrewsbury, 4 My. &. Cr. 672; Andrews *v.* Salt, L. R. 8 Ch. 622; In re Agar-Ellis, 10 Ch. D. 49. *Cf.* In re Meads, 5 Ir. R. Eq. 98; In re Grimes, 11 Ib. 465.

[2] In re McGrath, 1893, 1 Ch. 143; In re Newton, 1896, 1 Ch. 740.

[3] Shelley *v.* Westbrooke, Jac. 266; Thomas *v.* Roberts, 3 De. G. & Sm. 758; In re Besant, 11 Ch. D. 508.

[4] In re Doyle, 16 Mo. App. 159.

[5] In re Doyle, *supra*; Voullaire *v.* Voullaire, 45 Misso. 602; Desribes *v.* Wilmer, 69 Ala. 25; S. *v.* Bratton, 15 Am. L. Reg. N. S. 359; P. *v.* Gates, 43 N. Y. 40; Whalen *v.* Olmstead, 61 Conn. 263; North Pacific Board *v.* Ah Won, 18 Or. 339.

[6] In re Doyle, *supra*.

§ 32. **Settlement Of Property.**—Mere poverty or insolvency does not furnish an adequate ground for depriving a parent of the children, even though a fund is offered for their benefit, conditioned upon the surrender of their custody. If, however, property is settled upon an infant upon condition, that the parent surrender the custody and guardianship, and the latter has once acquiesced, he or she will not afterwards be allowed to claim the guardianship to the prejudice of the child, disappointing expectations of superior pecuniary or other advantages thus fostered.[1] In such and similar cases, upon equitable grounds connected with the welfare of the child, the courts will not allow a situation which has arisen in consequence of the acquiescence of the strict legal guardian or custodian to be altered to the detriment of the child.[2]

§ 33. **Injunction And Restraining Orders.**—One of the most efficacious and beneficial methods by which the power of courts of chancery in relation to the protection and care of infants is exercised is by means of the writ of injunction, or an order in the nature of an injunction, to restrain interference with their custody or person. The jurisdiction is well established and will be freely and liberally exercised, whenever the occasion arises.[3] Chancery may enjoin or restrain a parent or any one else from in any manner interfering with an infant on whose behalf the interposition of an equity court has been invoked. This doctrine, asserted by Ld. Thurlow as early as 1790, has been followed by Ld. Eldon and other English chancellors and equity judges, and numerous orders have been made in the broadest terms restraining attempts to remove children beyond the jurisdic-

[1] Lyons *v.* Blenkin, Jac. 245; In re Preston, 5 D. & L. 233; Jones *v.* Stockett, 2 Bland (Md.), 409, 431.

[2] *Supra*, § 13.

[3] Creuze *v.* Hunter, 2 Cox. Ch. Cas. 261.

tion of the court or in any manner interfering with their custody or control, or their persons.[1] In addition to this, the jurisdiction to restrain proceedings to obtain the custody by *habeas corpus* in the common law courts is well established by the English cases.[2]

*A fortiori*, may any person whatever be enjoined from attempting to possess himself of the person of an infant, without process of law, by force or other indirect or illegal means. Where an attempt was made by a father to secure possession of his daughter, residing against his will with strangers, by means of violence or stratagem, and a breach of the peace was threatened, an order was passed restraining the father from attempting to obtain possession of the child, otherwise than by legal process.[3]

The power of the chancery courts to intervene on behalf of infants by means of an injunction or a restraining order is equally well settled in the United States. Orders have been passed restraining parents or other guardians from removing infants beyond the jurisdiction of the court,[4] enjoining or restraining any interference with the custody, and enjoining proceedings at law. Such orders may be interlocutory,[5] or in the form of a final decree, or perpetual injunction. No particular forms or modes of procedure prevail, the action of the courts being shaped, in a great measure, according to the circumstances of each case.

[1] De Manneville *v.* DeManneville, 10 Ves. 52; Shelley *v.* Westbrooke, Jac. 266; Wellesley *v.* Duke of Beaufort, 2 Russ. 1; In re Plomley, 47 L. T. N. S. 283; Thomas *v.* Roberts, 3 De G. & Sm. 758.

[2] Warde *v.* Warde, 2 Phill. Ch. 786; Swift *v.* Swift, 34 Beav. 266; Reg. *v.* Barnardo, 1891, 1 Q. B. 194, 210.

[3] In re Lyons, 22 L. T. N. S. 770.

[4] Wood *v.* Wood, 5 Paige, 596, 605; In re Van Houten, 3 N. J. Eq. 220.

[5] S. *v.* Grisby, 38 Ark. 406.

In *Aymar v. Roff*,[1] the defendant was restrained from holding any conversation, or having any intercourse or correspondence with the child. In *Armitage v. Hoyle*,[2] the court enjoined proceedings at law and interference with the custody. In *Ellis v. Jessup*,[3] the father was perpetually enjoined from interfering with the plaintiff's custody of the children. *Goodrich v. Goodrich*[4] was a divorce proceeding in which the custody of the children was decreed to the mother and the father restrained from interfering with her care of them.

[1] *Supra*, § 25.
[2] 2 How. Pr. N. S. 438.
[3] 11 Bush (Ky.), 403.
[4] 44 Ala. 670.

## CHAPTER 3

### Disposal Of Custody Upon Habeas Corpus

§ 34. **Doctrine Generally Stated.**—In cases of writs of *habeas corpus* directed to private persons to bring up infants, the court is bound, *ex debito justitiæ*, to free them from an improper restraint, but is not bound to deliver them to anybody. If the infant be of the age of choice, the court leaves it to him to go where he will and will protect him in so going. If he be not of the proper age, the court will make an order for the proper custody, judging upon the circumstances of the particular case and giving its directions accordingly.[1] This is the doctrine laid down by Ld. Mansfield in the leading case of *R. v. Delaval*,[2] and may be said to embrace the accepted principle of decision in the American cases.[3] Subsequent English cases, however, introduced such explanations and qualifications of the general language of the doctrine, that it may be said to have been virtually repudiated by later English judges.[4]

§ 35. **English Doctrine.**—In subsequent English cases, the ground, that the court must judge upon the circumstances of the particular case[5] was abandoned. The judges adopted the theory, that the courts must be governed by fixed, general rules, to be applied irrespective of the hardship that might result in particular cases.[6] They accordingly laid down harsh,

[1] R. v. Delaval, 3 Burr. 1434; S. C., 1 W. Bl. 410; Blissett's Case, Lofft, 748.

[2] *Supra.*

[3] *Infra*, § 41.

[4] *Infra*, §§ 35-36.

[5] *Supra*, § 34.

[6] Reg. v. Clarke, 7 E. & B. 186.

technical rules, by the operation of which the very purposes for which infants are placed under custody were defeated. The determination by the common law courts of a case affecting the custody of a child became a travesty of justice and, eventually, the public conscience was aroused, and the supposed common law upon the subject was repealed by statute.[1] The rules referred to were characterized by simplicity at least. A child under the "age of choice"[2] was deemed to be unlawfully imprisoned, when unlawfully detained from the custody of the legal guardian, and, when delivered to him, was said to be set at liberty. Unless the guardian were "unfit" to have the custody, the child was deemed to be unlawfully detained, if kept from him.[3] The decisions, however, did not stop here. The term "unfit" seems to have been understood in quite a peculiar sense. There is no record of any case in which the character or conduct of the guardian was held to come within this designation; and the cases in which it was held, that "unfitness" had not been shown, indicate that the degree of depravity deemed sufficient to gratify the judicial conception of the meaning of the term must have exceeded all ordinary bounds. Finally, it was declared, that it was doubtful whether a court of common law could, under any circumstances, interfere with the guardian's custody.[4]

§ 36. **Same Subject.**—The deplorable results to which these views led are best shown by citing the leading cases of the period referred to.

*R. v. DeManneville*[5] arose upon an application of the mother for the custody of a child eight months old.

[1] *Infra*, § 37.
[2] *Infra*, § 39.
[3] Reg. *v.* Clarke, *supra*.
[4] In re Hakewill, 12 C. B. 223.
[5] 5 E. 221; 1 Smith, 358.

The mother had left her husband on account of ill-treatment, taking the child, whom she was nourishing, with her. It was represented, that the father, who was an alien enemy, was about to remove the child out of the kingdom. It appeared, that he had taken away the child by force from the nurse and carried it off, half clad, on a cold night. The court held, that the father was entitled to the custody, and declined to interfere.

In *Exp. Skinner*,[1] it appeared, that the child, aged six years, was kept from its mother under the control of its father, a prisoner in jail, and his avowed mistress. The court doubted its powers, and declined to interfere on behalf of the mother.

*Exp. McClellan*[2] arose upon an application by the father of a female infant "of tender years" to have her taken from the custody of the mother, in order that she might be returned to a school at which the father had placed her. It appeared, that the mother came to have possession, because she had taken her from school in consequence of the child's being afflicted with a scrofulous complaint, of which two others of her children had died, and that this child was in a very delicate state of health and required very great care and attention. The court seemed satisfied, that the child should remain with her mother, but declined to interfere.

In *R. v. Greenhill*,[3] the mother had left her husband on account of his open adultery, and had taken with her the three female children, of the respective ages of five years and a half, four and a half, and two and a half years, to the house of the maternal grandmother. As the father had not gone to the extent of bringing his mistress to his house or into contact with

[1] 9 J. B. Moore, 278.
[2] 1 Dowl. P. C. 81.
[3] 4 Ad. & El. 624; 6 Nev. & M. 244.

the children, and it did not appear, that he intended to do so, their custody was awarded to him.

§ 37. **Legislative Intervention.**—The law as thus declared shocked the moral sense of the people and led to the introduction into Parliament of a statute designed to remedy the supposed defective condition of the common law. It is said, that during the debate on this bill, Ch. J. Denman, one of the judges who decided the case of *R. v. Greenhill*, speaking of the decision, observed, that he believed, that there was not one judge who had not felt ashamed of the law, and that it was such as to render it odious in the eyes of the country. The comment of an American judge is, that the learned Ch. J. Denman probably mistook a judicial excrescence upon the law for the law itself, and that Parliament did little more than restore it to its former footing.[1]

The act referred to is the "Talfourd Act," 2 & 3 Vict., c. 54, passed 1839. It enabled courts of equity to make an order for the access of the mother to her infant children, under suitable regulations, when they were in the custody of the father, and, if an infant were within the age of seven years, to make an order, that it be delivered to and remain in the custody of the mother, until attaining such age.

By the "Infants' Custody Act," 36 & 37 Vict., c. 12, passed 1873, the former act was repealed and the power of the courts of chancery to commit to the custody of the mother was extended to cases of children within sixteen years and other provisions made, placing the entire matter upon a more liberal footing.

Still farther reforms were made by the "Guardianship Of Infants Act," 49 & 50 Vict., c. 27, passed 1886, and the "Custody Of Children Act," 54 & 55 Vict., c. 3, passed 1891. Perhaps the most important and

[1] Gishwiler *v.* Dodez, 4 O. St. 615, 622.

effective provision is that of the "Judicature Act," 36 & 37 Vict., c. 66, § 25 (10), that "in questions relating to the custody and education of infants the rules of equity shall prevail."

§ 38. **Later English Rulings.**—Partly as a result of this legislation and partly as the result of a change of sentiment in regard to domestic restraint and discipline, the English courts began to take much broader and more humane views, and the doctrine is now firmly established in England, that the welfare of the child is the controlling consideration in the determination of its custody.[1] Much greater stress is laid upon precedents and matters of procedure in England than in the United States, but the latest English cases, while abounding in learned discussions and citations, are emphatic in their statements of the plain and just principles underlying the law upon this subject. The jurisdiction in cases involving the custody of infants, the English tribunals declare, is essentially a parental jurisdiction, and the main consideration to be acted upon in its exercise is the benefit or welfare of the child. Further, it is held, the term "welfare" in this connection must be taken in its largest possible sense, that is to say, as meaning, that every circumstance must be taken into consideration and the court must do what, under the circumstances, a wise parent, acting for the true interests of the child, would or ought to do.[2]

§ 39. **English Doctrine As To Age Of Choice.**—From the language of the English courts in a number of cases, it would seem to follow, that upon arriving at the age of fourteen years, when guardianship for nurture ceases, an infant may exercise a discretion to

[1] Smart *v.* Smart, 1892, App. Cas. 425; In re McGrath, 1893, 1 Ch. 143; Reg. *v.* Gyngall, 1892, 2 Q. B. 232; In re A. & B, 1897, 1 Ch. 786.

[2] Reg. *v.* Gyngall, *supra*.

withdraw from the parental custody.[1] This statement must be accepted with some modifications. In *Reg. v. Howes*,[2] the Court of Queen's Bench ruled, that the father was entitled to the custody of his *daughter* under the age of *sixteen* years, holding, that it is not the age of nurture, but the age of discretion, that limits parental authority. This determination was based, partly at least, upon considerations arising from the wording of 4 & 5 P. & M., c. 8, § 3, which makes it an offense to take any maid or woman child unmarried, *being within the age of sixteen years*, out of or from the possession and against the will of the father or mother of such child. It was afterwards ruled by a majority of the Court of Queen's Bench for Ireland, that this decision did not extend beyond the case of a daughter and only established, that as between a father and his daughter, the period of discretion does not arrive, until she is sixteen years old.[3] In the subsequent case of *In re Agar-Ellis*,[4] it was stated to be the rule, in the case of boys above the age of fourteen and girls above the age of sixteen, when brought up by *habeas corpus*, if it was the father who sued, they being out of his custody, to permit the children to elect their custodian, but that this rule was inapplicable, where the child was not away from the father, but in his custody.

§ 40. **American Doctrine Generally.**—Proceeding upon the theory, that the guardian, whether by nature or by specific appointment, was entitled to the custody as a matter of strict right and that the infant, when below the age of discretion, could not be said to choose in such cases, the English courts, at one

[1] R. *v.* Greenhill, 4 Ad. & El. 624; S. C., 6 Nev. & M. 244; Reg. *v.* Clarke, 7 E. & B. 186.

[2] 3 El. & El. 332; S. C., *nom.* Exp. Barford, 8 Cox C. C. 405.

[3] In re Connor, 16 Ir. C. L. N. S. 112.

[4] 24 Ch. D. 317.

period,[1] felt themselves bound to deliver up the infant to its guardian for the same reason by which they would feel themselves bound to release an adult from prison, if illegally confined. Thus the proceeding by *habeas corpus* became practically a guardian's remedy to recover possession of his ward. Such has never been the course of ruling in the United States. As a matter of *procedure*, the American courts have held, in almost innumerable instances, that the office of the writ of *habeas corpus* is, not to recover possession of persons detained, but to free them from all illegal restraints upon their liberty.[2] As a matter of *substantive right*, the prevailing view in the American courts has always been, that as guardianship is in the nature of a trust, placed in the person invested with the office of guardian for the infant's benefit,[3] he can not *claim* the custody as a matter of strict right, but the same may be awarded to him upon grounds connected with the welfare of the infant.[4]

Without present advertence to the considerations that enter into the determination of questions connected with the matter of the age of choice,[5] it may be stated, as a general rule, that when an infant is capable of making a choice, the court will relieve itself of the responsibility of determining the custody, and leave the infant free to go where it pleases. On the other hand, in the case of an infant incapable of

[1] *Supra*, §§ 35-36.

[2] In re Barry, 42 Fed. R. 113; S. C, 136 U. S. 597; In re McDowle, 8 Johns. 328; In re Waldron, 13 Ib. 418; In re Wollstonecraft, 4 Johns. Ch. 80; P. *v.* Kling. 6 Barb. 366; In re Larson, 31 Hun, 539; C. *v.* Hammond, 10 Pick. 274; C. *v.* Addicks, 5 Binney, 520; S. *v.* Smith, 6 Me. 462; S. *v.* Paine, 4 Humph. (Tenn.) 523; S. *v.* Baird, 18 N. J. Eq. 194; In re Doyle, 16 Mo. App. 159.

[3] *Supra*, §§ 3, 10. 22.

[4] *Infra*, § 41.

[5] *Infra*, §§ 44-46.

such choice,[1] the court must of necessity determine the proper custody.

Actual misconduct or unfitness on the part of the parent or other guardian need not be shown, in order to justify the court in withholding the custody from him. The conduct and character of the adult parties, relator and respondent, are not directly in issue, and the rules which apply in cases of persons charged with crime or misconduct have no application. All doubts as to whether or not the custody of a particular claimant or applicant would enure to the benefit of the child the disposal of whose custody is in question must be solved in favor of the latter. It should appear affirmatively, to the satisfaction of the court, that the custody in which the child is to be placed is that demanded by its interests and best adapted to its needs. It has been justly observed, that much of the confusion and conflict found in cases on this subject is due to the fact, that proceedings involving the custody of children have at times been viewed from the standpoint of contests between the parties claiming the custody, instead of from the single point of view of the rights and interests of the children.[2]

§ 41. **Infants Incapable Of Choice.**—In the exercise of their duty to determine the proper custody of an infant incapable of making a choice, the courts always have regard to the consideration, that ordinarily such infant should be confided to its legal guardian, who is *prima facie* the rightful custodian. In some earlier American cases, this matter was treated as of such controlling force, that custody was awarded to the parent or other legal guardian with slight, or no, reference to the consideration of the interests of the

[1] *Infra*, §§ 41-43.

[2] In re Gregg, 5 N. Y. Leg. Obs. 265.

child.[1] The sounder doctrine, as established by the great weight of reasoning as well as of precedent, is, that in contests for the custody of infants, neither party has any rights or claims that can be made to conflict with the welfare of the child, and that, if the child is incapable of making a choice for itself, the order of the court should be made with single reference to its bests interests.[2] Leaving out of consideration minor questions and slight differences, it will be found, that, in the American courts, the equitable doctrine of Lord Mansfield is the accepted principle of decision; that, while they are controlled by settled principles of law, the tendency of our courts is, to decide upon the merits of the particular case, rather than lay down general rules which may operate harshly in particular cases;[3] and that the welfare of the infant is the paramount consideration in each case, to which all other considerations must yield.[4] So firmly is this

[1] In re Kottman, 2 Hill S. C. 363; Exp. Williams, 11 Rich. (S. C.) 452; Hutson *v.* Townsend, 6 Rich. (S. C.) Eq. 249; P. *v.* Chegaray, 18 Wend. 637; P. *v.* ——, 19 Ib. 16; P. *v.* Humphreys, 24 Barb. 521; Tarkington *v.* S., 1 Ind. 171; C. *v.* Briggs, 16 Pick. 203; Moore *v.* Christian, 56 Miss. 408; Rust *v.* Vanvacter, 9 W. Va. 600; S. *v.* Richardson, 40 N. H. 272; In re Vetterlein, 14 R. I. 378.

[2] *Supra*, §§ 22, 34.

[3] *Supra*, § 22.

[4] In re Barry, 42 Fed. R. 113; S. C., 136 U. S. 597; U. S. *v.* Green, 3 Mason, 482; S. C., Fed. Cas. 15,256; C. *v.* Addicks, 5 Binney, 520; S. C., 2 S. & R. 174; C. *v.* Sears (D'Hauteville Case), 3 L. R. 304; C. *v.* Gilkeson, 1 Phila. 194; C. *v.* Adams, 16 Ib. 516; C. *v.* Smith, 1 Brewst. 547; C. *v.* Hart, 8 W. N. C. 156; C. *v.* Ashton, Ib. 563; In re Waldron, 13 Johns. 418; In re Gregg, 5 N. Y. Leg. Obs 265; Mercein *v.* P., 25 Wend. 64; P. *v.* Watts, 122 N. Y. 238; P. *v.* Erbert, 17 Abb. Pr. 395; In re McKain, Ib. n.; Richards *v.* Collins, 45 N. J. Eq. 283; S. *v.* Smith, 6 Me. 462; Hoxsie *v.* Potter, 16 R. I. 374; C. *v.* Maxwell, 6 L. R. 214; Nickols *v.* Giles, 2 Root (Conn.), 461; Merritt *v.* Swimley, 82 Va. 453; Hill *v.* Hill, 49 Md. 450; Nugent *v.* Powell, 4 Wyom. 173; Exp. Schumpert, 6 Rich. (S. C.) 344; Anderson *v.* Young, 32 S. E. Rep 448; Gardenhire *v.* Hinds, 1

principle established in American jurisprudence, that statutory enactments providing, that the courts may exercise a discretion in withholding the custody from the legal guardian are generally regarded as merely declaratory of the common law; and, on the other hand, in states where there is an express statutory provision, that the parents, if not unfit, *shall be entitled* to the custody, it is yet held, that the courts, taking the statute as a *general guide*, must look to the circumstances of each particular case and give *special attention* to the best interests of the child.[1]

In Maryland, it is expressly provided by statute, in language declaratory of the common-law doctrine above stated, that the court or judge, in the determination of the custody of a minor brought up by *habeas corpus*, "shall be guided and controlled by a parental consideration of what is demanded by the best interests of such minor, and the custody shall be determined without regard to technicalities of procedure and without reference to any alleged technical claim or right of custody."[2]

§ 42. **Leading American Cases.**—Some of the older American cases hold, that in contests between parents for the custody of children below the age of choice, unless there is some justifiable cause for the separation, the court should not sanction the action of the wife in living apart from her husband by ordering

Head (Tenn.) 402; Gishwiler *v.* Dodez, 4 O. St. 615; Clark *v.* Bayer, 32 Ib. 299; Corrie *v.* Corrie, 42 Mich. 509; In re Heather Children, 50 Ib. 261; In re Stockman, 71 Ib. 180; Schroeder *v.* S., 41 Neb. 475; P. *v.* Porter, 23 Ill. App. 196; In re Lewis, 88 N. C. 31; In re Blackburn, 41 Mo. App. 622; Wand *v.* Wand, 14 Cal. 512; In re Beckwith, 43 Kans. 159; Fouts *v.* Pierce, 64 Iowa, 71.

[1] Sturtevant *v.* S., 15 Neb. 459, 463; Jones *v.* Darnall, 103 Ind. 569; Bryan *v.* Lyon, 104 Ib. 227; Sheers *v.* Stein, 75 Wis. 44, 51; Lally *v.* Fitz Henry, 85 Iowa, 49.

[2] Laws 1890, ch. 70.

the children into her custody.[1] The later and better considered cases proceed upon different grounds. The misconduct or fault of a contesting party to a *habeas corpus* proceeding is taken into account only to the extent to which it affects his or her fitness as a proper custodian for the child.

*C. v. Addicks*[2] arose in 1813 before the Supreme Court of Pennsylvania and is said to be the leading American case, giving tone to the decisions of all other states.[3] Upon the application of Joseph Lee, a writ of *habeas corpus* issued to bring up his two daughters, seven and ten years of age, detained under the care of their mother, Barbara Addicks, with whom as stated in the return, they had lived from their birth. The relator had been divorced from the mother for her adultery, and she afterwards had married one Addicks, who, together with her, was made respondent upon the application. The parents introduced charges and counter-charges of a character usual in such proceedings. The remarriage of the mother was in violation of a prohibition applicable to persons against whom a decree of divorce had been rendered for adultery, and she was, therefore, living in virtual adultery. The court, while expressing its disapprobation of her conduct, yet finding, that as far as the treatment of the children, who appeared to have been well taken care of in all respects, was concerned, she was in no fault, restored them to her. Ch. J. Tilghman said, that it was to them that the anxiety of the court was principally directed; and that it appeared, considering their tender ages, that they stood in need of that kind of assistance which could be afforded by none so well as by a mother. On their account, exercising the discretion with which the

[1] Bryan v. Bryan, 34 Ala. 516.
[2] 5 Binney, 520.
[3] C. v. Gilkeson, 1 Phila. 194, 196.

court was invested, it was deemed best, at that time, not to take them from her.

Three years afterwards, the father made another application for the custody.[1] The court then referred to and reiterated the positions held in the former case. "The great object of the writ of *habeas corpus*," said Ch. J. Tilghman, "is to free the person from an illegal restraint. That being done, the court may proceed farther or not, as the circumstances require. These children do not stand before us in the same position as formerly. The eldest has now arrived at a critical age; every moment is important; and the education of the next three years will probably decide her fate. The case of the youngest is not so urgent; but it is important, that the sisters should not be separated. When we decide for the one, therefore, we must decide for both." The custody was awarded to the father. Great stress was laid upon the fact, that the mother's second marriage was void, and that the effect of continuing the children with her would be, to instil into their minds lax notions of the sacredness of the marriage obligation.

*C. v. Sears*,[2] generally cited as the *D'Hauteville Case*, decided 1840, by the Philadelphia Court of General Sessions, attracted a great share of public attention at the time and has since been one of the most frequently quoted cases. In addition to the report cited, a full report of the entire proceedings and evidence appears in a separate volume.[3] The writ of *habeas corpus* was issued, at the instance of the father, to bring up his son, aged less than two years, detained in the custody of the mother, who had left her husband on account of unhappy differences and resided with her parents,

[1] C. v. Addicks, 2 S. & R. 174.

[2] 3 L. R. 304.

[3] "Report of the D'Hauteville Case," Philadelphia, 1840, William S. Martien, printer.

who, together with her, were made respondents in the proceeding. The case was a lengthy one, lasting over four months from the time of its institution to the date of the final decision and was strenuously contested. On the part of the relator, it was contended, that the custody of the child is the vested and absolute right of the father, of which he cannot be deprived, except where it becomes forfeited by his unfitness to take charge of its morals or interests, or by such misconduct as would afford good ground for a divorce *a vinculo matrimonii*. The court was earnestly invoked to treat the decision in the *Addick's* case as a judicial anomaly, to ride over it and ride it down; but the principle of that decision was fully sustained and confirmed. The conclusion arrived at, after an elaborate examination of English and American authorities, was, that the determination of the custody is a matter of judicial discretion, to be exercised, upon the circumstances as they appear in the particular case, in accordance with what is demanded by the best interests of the child. It was observed, that the father's character might be stainless; he might not be affected with the slightest disqualification from superintending the general welfare of the child; the mother might have separated from him without the barest pretense of justification—and yet the interests of the child might imperatively demand the denial of the father's claim and its continuance with the mother. The child was restored to the mother upon the sole ground, that its welfare would thus be better subserved than if it had been confided to the father.

The various cases instituted in consequence of the controversy between John A. Barry and his wife, who were living apart, furnish a remarkable example of the heat and rancor with which such contests may be carried on. The proceedings were begun in 1839, the child being then about fifteen months old, by a writ, issued at the instance of the husband, requiring

Thomas R. Mercein, the father of the wife, who, together with the child, resided with him, to produce them before the Recorder of the City of New York, who made an order restoring the child to the custody of the mother. A few days after the passing of this order, the father obtained another writ of *habeas corpus*, returnable in the court of chancery, requiring the same respondent to produce the wife and child.[1] The child was again restored to the mother, upon the ground, that infants of such tender age as the child of these parties should not be taken from the mother without sufficient reasons against her fitness, which had not been established in this case.

A few months after this decision the father procured a third writ of *habeas corpus*, directing the same defendant to bring the child before Judge Inglis, of the Court of Common Pleas of the City and County of New York. The judge decided, that the matters in difference between the parties up to the time of the making of the order by the chancery court must be considered *res judicata*. New evidence was then introduced on both sides, and Judge Inglis, ruling as the other judges had done, discharged the writ. The relator thereupon sued out a writ of *certiorari*, upon which the proceedings were removed into the Supreme Court, where the decision of Judge Inglis was reversed upon the grounds, (1) that the father's right to the custody was paramount and could be forfeited only by gross misconduct or clear incapacity to discharge his parental duties, and (2) that the doctrine of *res judicata* did not apply, and the relator was not estopped, or concluded, by the proceedings before the chancellor from claiming the custody, which, this tribunal held, should have been awarded to him. Thereupon the respondent sued out a writ of error, upon which the record was removed into the Court of

[1] P. *v.* Mercein, 8 Paige, 47.

Errors.[1] This court, by a vote of 19 to 3, reversed the judgment of the Supreme Court, and a resolution was adopted declaring, that the decision of Judge Inglis upon the question of *res judicata* was correct. The opinion of Senator Paige, in which the doctrine of parental custody is fully discussed, enforces with great clearness and strength of reasoning the proposition, that the custody is referable to the interest and welfare of the child and is to be adjudged by the court, in the exercise of a sound discretion, irrespective of the claims of either party. "This conclusion," said he, "I believe is warranted by the law of this state as well as by the law of nature. A sense of parental duty ought ever to withhold a parent from pressing his or her claims to the custody of a child, whenever the interests of such child forbid it; and, whenever this parental obligation fails to influence the conduct of the parent, it is fortunate, that the enlightened principles of our law authorize our courts to interpose on behalf of the child."

Intermediately between the decision of the Supreme Court and that of the Court of Errors, the father had obtained a fourth writ of *habeas corpus*, directed to his wife and her father, returnable before Judge Oakley, one of the justices of the Superior Court, who decided, that the child was not improperly detained and discharged the writ. In the year 1842, the father obtained yet another writ, issued by the Supreme Court,[2] consisting of Nelson, Ch. J., Bronson and Cowen, J.J., a majority of whom, being of the opinion, that the circumstances of the case had materially changed since the time of the hearing before Judge Oakley, by reason of the advanced age of the child, ordered, that it be delivered to the father. This decision was reversed by the Court of Errors upon

[1] Mercein *v.* P., 25 Wend. 64.
[2] P. *v.* Mercein, 3 Hill, 399.

substantially the same grounds that led to the former reversal. This last decision of the Court of Errors does not appear to be reported.

Mr. Barry afterwards, in the year 1844, filed a petition in the Supreme Court of the United States[1] for a writ of *habeas corpus* to bring up the child, alleging that he was a subject of Great Britain and that the child was unlawfully kept from him by Mrs. Mercein, the grandmother, who resided in the district of New York. The petition was dismissed for want of jurisdiction. The petitioner then made a similar application to the Circuit Court of the United States for the Southern District of New York,[2] which court likewise disallowed his petition. He thereupon brought the case before the Supreme Court of the United States again upon a writ of error from the judgment of the Circuit Court.[3] The writ of error was dismissed for want of jurisdiction; and here seems to have ended this remarkable litigation.

*U. S. v. Green*,[4] which arose in 1824 before Judge Story, upon an application of the father to remove his daughter, aged ten years, from the custody of the maternal grandfather, is a frequently quoted case. While the case was not determined, owing to an agreement arrived at between the parties, and while the important question of jurisdiction[5] seems to have been overlooked, the opinion of Judge Story is yet valuable because of its clear and strong exposition of the nature of the questions involved in such contests. His opinion on this point is as follows:

"As to the question of the right of the father to have the custody of his infant child, in a general

[1] Exp. Barry, 2 How. 65.
[2] In re Barry, 42 Fed. R. 113; S. C., 136 U. S. 597.
[3] Barry *v.* Mercein, 5 How. 103.
[4] 3 Mason, 482; Fed. Cas. 15,256.
[5] *Infra*, § 51.

sense, it is true; but this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of its natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father and to withdraw it from other persons, it will look into all the circumstances and ascertain, whether it will be for the real permanent interests of the infant, and, if the infant be of sufficient discretion, will also consult its wishes. It will free the infant from all undue restraint and endeavor, as far as possible, to administer a conscientious parental duty with reference to its welfare. It is an entire mistake to suppose, that the court is at all events bound to deliver over the infant to its father, or that the latter has an absolute vested right in its custody."

§ 43. **Principles Of Decision.**—The doctrines announced in the decisions quoted are now firmly established throughout the United States. Generally speaking, it may be stated to be the well-settled practice of the American courts in controversies between parents for the custody of infant children, whether arising upon *habeas corpus* or in divorce proceedings, to award the custody of the younger children and female children of all ages to the mother in preference to the father.[1] If the child is so young as particularly to need the mother's care, it will be awarded to her,

[1] C. *v.* Addicks, 5 Binney, 520; C. *v.* Smith, 1 Brewst. 547; C. *v.* Hart, 8 W. N. C. 156; S. *v.* Smith, 6 Me. 462; C. *v.* Maxwell, 6 L. R. 214; Helms *v.* Franciscus, 2 Bland (Md.), 544, 563; Hawkins *v.* Hawkins, 65 Md. 104, 112; P. *v.* Mercein, 8 Paige, 47; Anonymous 55 Ala. 428; Wand *v.* Wand, 14 Cal. 512; Draper *v.* Draper, 68 Ill. 17, 20; S. *v.* Baird, 21 N. J. Eq. 384; In re Delano, 37 Mo. App. 185; Leavitt *v.* Leavitt, Wright (Ohio), 719; Lyle *v.* Lyle 86 Tenn. 372.

even though she leads an immoral life, or a decree has been passed against her for adultery.[1] If there are several children, it is the practice so to dispose of them, that children of a near age will be kept together.[2] As between a parent and a relative, or even a stranger, an infant of tender years will be left with the latter, if found to be in need of care which the parent is unable to bestow, but which can be afforded by the latter.[3] When the child has been for any length of time in the custody of a person other than the parent or other guardian, the courts will not ordinarily make a change, unless the interests of the child clearly appear to demand it.[4] In cases where persons have in good faith acquired the custody of a child in the expectation of being allowed to keep the child, their interests are also to be considered and should be allowed to control as against the interest or wishes of the parents or guardians who have parted with the custody to them.[5] Custody may be confided to a third party,[6] and a child may upon *habeas corpus* be removed from the possession of the strict legal guardian.[7] Upon a change of circumstances, the custody as formerly awarded may be changed.[8] The power of the courts is a discretionary one, in the fullest sense of the term, to do what the welfare of the

[1] C. v. Addicks, *supra;* Dailey v. Dailey, Wright (Ohio), 514; Haskell v. Haskell, 152 Mass. 16.

[2] Warde v. Warde, 2 Phil. Ch. 786, 791; C. v. Addicks, 2 S. & R. 174; English v. English, 39 N. J. Eq. 738; Lusk v. Lusk, 28 Misso. 91.

[3] Sturtevant v. S., 15 Neb. 459; S. v. Schroeder, 37 Ib. 571; Schroeder v. S., 41 Ib. 745; Jones v. Darnall, 103 Ind. 569; In re Beckwith, 43 Kans. 159.

[4] *Supra*, § 15.

[5] *Supra*, § 16.

[6] *Infra*, § 47.

[7] *Infra*, § 49.

[8] C. v. Addicks, 2 S. & R. 174.

child requires to be done,[1] a power to be freely and liberally exercised, so as to promote the real objects of the law, without regard to the ordinary technicalities of procedure.[2]

§ 44. **Wishes And Choice of Infant.**—The object of the writ of *habeas corpus* is to free from illegal restraint or duress. In cases of infants as well as adults, the courts are not bound to do more than free from unlawful detention.[3] In cases of infants, however, brought up in private custody,[4] under an extention of the strict legal scope of the remedy by *habeas corpus*, the courts, acting as judicial conservators of the interests of infants, may change the custody at their discretion, allowing the child, in some cases, *to* select for itself, in others, making the selection for it.[5] To what extent the choice of infants will be allowed to govern and what may be considered a proper age or qualification for such choice are matters that can not be determined by definite rules, and the cases on these points are conflicting. In certain cases, without reference to the consideration of the years or intelligence of the child whose custody is involved, special regard is had to the wishes of children in any degree capable of forming or expressing a choice. The doctrines, that the child's welfare is the paramount consideration in the determination of the custody,[6] that courts are never *bound* to award the custody to any one,[7] that if there has been abandonment, relinquishment or loss of custody, it should ordinarily not be restored to the parent or other guardian,[8] even though

[1] *Supra*, §§ 40, 41.
[2] *Infra*, § 57.
[3] *Supra*, § 40.
[4] *Infra*, § 52.
[5] In re Barry, 42 Fed. R. 113; S. C., 136 U. S. 597.
[6] *Supra*, § 41.
[7] *Supra*, § 40.
[8] *Supra*, §§ 14-16.

there has been no fault or misconduct on his part,[1] apply with especial force in cases where an award of custody would be in opposition to the expressed wishes of the child. Where the custody in which a child is brought up by *habeas corpus* does not involve an injurious detention and the justice of the relator's application is at all doubtful, if the child, though quite young, yet capable of signifying an intelligent choice, prefers not to be restored to the custody of the parent or other applicant, the court should not make any change, but leave matters in *statu quo*,[2] more particularly, if it appears, that a parent has voluntarily parted with the custody, or the child has formed new ties and associations which can not be severed without inflicting pain upon it.[3] When a child has been sheltered and maintained by strangers for such a period that attachment to present associations and custodians dominates over the affections engendered by ties of blood, whatever may have been the cause that led to this situation, it should not be coerced into a return to parental custody.

§ 45. **Same Subject.**—As to what constitutes the "proper age" of choice, there is a conflict of ruling. Some cases hold, that if there is no natural or other guardian, the age of choice is seven years. Thus, it was once doubted, whether the parents of an illegitimate child were its legal custodians and held, that such a child, if above seven years of age, when brought up by *habeas corpus*, would not be delivered into any cus-

[1] *Supra*, § 17.

[2] In re Wollstonecraft, 4 Johns. Ch. 80; C. *v.* Hammond, 10 Pick. 274; S. *v.* Scott, 30 N. H. 274; Brinster *v.* Compton, 68 Ala. 299.

[3] In re McDowle, 8 Johns. 328; In re Murphy, 12 How. Pr. 513; Fouts *v.* Pierce, 64 Iowa, 71; In re Beckwith, 43 Kans. 159; In re Goodenough, 19 Wis. 274; In re Gates, 95 Cal. 461; Ellis *v.* Jessup, 11 Bush. (Ky.), 403; S. *v.* Bratton, 15 Am. L. Reg. N. S. 359.

tody against its wishes.[1] In the case of legitimate children, it has been variously held, that when above fourteen years, the age of nurture, a child must in every case choose for itself[2] and that the wishes of children above that age might be consulted, but would not necessarily control.[3] In some instances, slight weight was attached to the choice of infants of sufficient intelligence, sometimes of rather advanced age, especially when the courts believed the selection to be disadvantageous to the child's best interests.[4] In some rare instances, the choice of such children was overruled upon technical grounds, without reference to the question of their welfare.[5] It has been ruled, that a child under fourteen years has no choice in the matter of its custody[6]—that the wishes of a child between seven and fourteen years of age may be consulted[7]—that the wishes of children under seven years of age may be consulted.[8] The age of discretion, according to the best considered cases, is not a fixed period of life, but is to be ascertained, not merely by number of years, but by the child's actual capacity, information, intelligence and judgment.[9] In the case of infants of more advanced age, the regard paid to their wishes increases, both in view of the fact of enlarged capacity of choice and the consideration that slight good can be expected to result from coercion or

[1] In re Lloyd, 5 M. & G. 547; Matthews *v.* Hobbs, 51 Ala. 210.

[2] In re Goodenough, 19 Wis. 274.

[3] S. *v.* Richardson, 40 N. H. 272; Rising *v.* Dodge, 2 Duer, 42.

[4] Rust *v.* Vanvacter, 9 W. Va. 600; Shaw *v.* Nachtwey, 43 Iowa, 653.

[5] Exp. Williams, 11 Rich. (S. C.) 452; Moore *v.* Christian, 56 Miss. 408.

[6] Bonnell *v.* Berryhill, 2 Ind. 61

[7] In re Goodenough, *supra*.

[8] In re Poole, 2 McAr. (D. C.) 583.

[9] Woodruff *v.* Conley, 50 Ala. 304; S. *v.* Bratton, 15 Am. L. Reg. N. S. 359, 363.

restraint.[1] The courts may, however, in any case, prevent an infant brought before them on *habeas corpus* from going with an improper person, whose custody would be injurious.[2]

§ 46. **Same Subject.**—The effect of the production of an infant in obedience to the writ of *habeas corpus* is to place it, in legal contemplation, in the custody of the court, subject to its disposition,[3] and the power of disposition then rests upon the foundation of the general jurisdiction over infants.[4] From the nature of the jurisdiction of the courts in such cases, it would seem necessarily to follow, that there is, within the entire period of infancy, no particular age of *absolute choice.* Guardianship for nurture, in the sense in which the term is used in England, is with us superseded by guardianship by nature, which lasts during minority.[5] It is rather difficult, therefore, to accept the theory, that the arbitrary period of fourteen years determines, in every case, the right of the infant to choose his custody. It is equally difficult to accept the theory, that any degree of intelligence on the part of a child entitles it to elect for itself with whom or where it will go, or, on the other hand, the theory, that the wishes and preferences of the child are not at all to be consulted by the court, if the child is below any particular age. The fallacy of these views lies in the assumption of a limitation upon the powers of the court arising out of circumstances that tend merely as a *guide to its discretion.* A court, on the one hand, is not *bound to award* the custody of an infant to any guardian or other person. On the other hand,

[1] In re Lyons, 22 L. T. N. S. 770; Maples v. Maples, 49 Miss. 398; Roberts v. Walker, 18 Ga. 5.

[2] S. v. Bratton, *supra.*

[3] *Infra,* § 58.

[4] In re Barry, 42 Fed. R. 113; S. C., 136 U. S. 597.

[5] *Supra,* § 6.

the court is not *bound* to give the infant (of whatever age it may be) any *privilege*, but this matter must be left to its discretion, the true rule being, that the court is to judge upon the circumstances of the particular case and give its directions accordingly.[1] When the infant is unable to choose, the court must of necessity determine the proper custody. If the infant is able to make a choice, the court is, in a great measure, relieved from responsibility. As the court has only to guard against an injurious custody, when the infant is capable of making the choice, it will go no farther than to prevent an improper choice, having due regard to the general policy of the law designating certain persons as custodians and taking it into consideration, that ordinarily an infant can not wantonly withdraw from such custody. When the infant has actually been out of such custody for some length of time, or when the infant's choice is not unreasonable, under all the circumstances of the case, the court should ordinarily not exercise any compulsion; and the responsibility and obligation of the court to go beyond the expressed wishes of the child decrease in proportion to its years, its intelligence and judgment. During the entire period of minority, infants are under guardianship, and the guardian's custody is an incident of his trust. All the authorities, however, agree, that the sole object of such custody is the benefit and protection of the infant and that it is to be exercised in strict subordination to that end. In the determination of the custody, the welfare of the infant is the paramount consideration. Looking at the matter in this light, as one affecting the welfare of the infant, it may be said, that no good can, as a rule, be accomplished by compelling an infant of intelligence and discretion to go against his consent with a person legally his custodian. The very fact that such an objection or

[1] *Supra*, § 34.

repugnance at all exists is ordinarily proof, that the person *prima facie* the proper custodian has not succeeded in fulfilling his trust in the best manner. It has been well observed, that while courts would naturally wish to see the broken bonds of affection re-united, that must be accomplished through the influence of kindness, not by the assertion of a claim to the custody as matter of legal right.[1] Wardship must not be converted into virtual imprisonment. As the natural disabilities of infancy decrease with added years, so the benefits to be accomplished by restraining influences lessen, and, with advanced years, approaching to majority, the choice allowed to the infant should be extended and, to the greatest degree, prevail.

§ 47. **Custody Confided To Third Party.**—The great object of the courts being, in all cases, to protect infants when brought before them and not suffer them to depart in improper or injurious custody, the application of both contending parties to a suit by *habeas corpus* may be denied and the custody confided to a third party. The child, in such cases, may be given into the care of a public institution or juvenile home,[2] or it may be confided to the care of an individual.[3] This is a matter entirely discretionary with the court. The authority to place a child in the care and custody of a third party is as clear and may be as freely exercised as the power to confide the child to either the relator or the respondent. The very fact, that the contest over the custody of a child has assumed the form of a bitter quarrel between the contending parties to which concern for the interests of the child has been subordinated may point out the duty of the court, proceeding with primary regard

[1] Exp. O'Neal, 3 Am. L. Rev. 578.
[2] C. v. DeGiglio, 6 Phila. 304; In re Clifton, 47 How. Pr. 172.
[3] In re Bort, 25 Kans. 308; C. v. Nutt, 1 P. A. Browne (Pa.), 143.

for the welfare of child, to refuse the application of both. This course is sometimes clearly indicated in cases of contests between husband and wife, if the proceedings are conducted with such a degree of animosity as to make it apparent, that the child could not be placed in the custody of one without becoming estranged from the other. In Maryland, it is expressly declared by statute, that in a proceeding by *habeas corpus*, the child may be committed to the care of any private person, body corporate, or institution, for such period and upon such terms as the court or judge may deem beneficial.[1]

§ 48. **When Custody Will Be Changed.**—Guardianship being a trust created for the benefit of the infant, it follows, that if the parent or other guardian of a child is unfit for the charge, he can not demand its removal from a custody that is not injurious for the purpose of having the child delivered over to a person appointed or selected by him.[2] On the other hand, courts will, under certain circumstances, remove infants of tender years from a custody which is in itself entirely unobjectionable, if their best interests, with a view to their future prospects and situation in life, would be thereby promoted.[3] Custody, in the first instance, is not conferred on any particular person for his gratification, but on account of the infant; neither is it taken away to punish the custodian for misconduct, but to protect the infant; and the character and conduct of the contending parties are to be considered only with reference to the question of their fitness to be entrusted with the custody.[4] Where, for instance, the children are of such tender years as to be the peculiar objects of a mother's care, they may

[1] Laws 1890, ch. 70.

[2] In re Turner, 41 L. J. Q. B. 142; S. C., 25 L. T. N. S. 907.

[3] In re Bullen, 28 Kans. 781; In re Doyle, 16 Mo. App. 159.

[4] *Infra*, § 57.

be placed in her custody, although she is a person of bad morals;[1] and when they have reached years when such care is no longer essential, they may be removed.[2]

§ 49. **Taking Custody From Legal Guardian.**—While it is now established beyond controversy, that a court is not bound to restore an infant to his legal guardian by means of the writ of *habeas corpus*[3] the power of the courts to remove an infant, when brought up by *habeas corpus* in the actual custody of the parent or other person who is the strict legal custodian has been doubted and denied.[4] On the other hand, the right has been asserted and acted upon.[5] It seems entirely reasonable and just, that there should be no limitation in this respect upon the power of the courts otherwise so freely exercised for the benefit of infants. Custody should not be made to depend on the accident of possession; the question should be, not who has the child, but to whom should it be entrusted, for its own sake and that of society.[6] Apart from any such consideration of justice and right, the assertion of the jurisdiction may be placed upon entirely satisfactory and tenable grounds. In cases affecting the private custody of infants, the writ of *habeas corpus* issues irrespective of any question of actual illegal imprisonment or restraint, and the courts act, under an extension of the ordinary scope of the writ, upon an assertion of the general jurisdiction over infants.[7] Upon the return of the writ thus issued, the power to

[1] *Supra*, § 43.

[2] *Supra*, § 42.

[3] *Supra*, § 40.

[4] Exp. Boaz, 31 Ala. 425; P. *v.* Wilcox, 22 Barb. 178; Macready *v.* Wilcox, 33 Conn. 321.

[5] In re Hansen, 1 Edm. Sel. Cas. 9; P. *v.* Brown, 35 Hun, 324; S. *v.* Paine, 4 Humph. (Tenn.) 523; S. *v.* Baird, 18 N. J. Eq. 194; Deringer *v.* Deringer, 10 Phila. 190; S. *v.* King, 1 Geo. Dec. 83.

[6] 2 Lea. Cas. Eq., White & Tudor's Notes, 1528.

[7] *Infra*, § 52.

be exercised is not referable to its ordinary scope; the court is not limited to the inquiry, whether there is an illegal restraint of liberty in the ordinary sense: the inquiry is into the entire question of the surroundings of the child—whether these are such as make for its highest welfare—and the court is then authorized and required to do on behalf of the child, thus legally before it and technically in *its* custody,[1] that which the child's welfare requires.[2] The stretch of jurisdiction, if such it may at all be considered, is in the issue of the writ in the first instance, upon a mere assumption of imprisonment or restraint, made for the very purpose of bringing the child within the well-defined jurisdiction of the courts.

In Maryland, it is expressly declared by statute, that in a proceeding by *habeas corpus* an infant may be removed from the custody of the parent or other guardian or legal custodian.[3]

[1] *Infra*, § 58.

[2] In re Bullen, 28 Kans. 781, 785.

[3] Act 1890, ch. 70.

## CHAPTER 4

### Procedure Upon Habeas Corpus

§ 50. **Legal Remedies To Be Invoked.**—The most usual method of settling disputed questions of the custody of infants is by resort to the writ of *habeas corpus ad subjiciendum*, which, in the greatest number of cases, is the only appropriate remedy. Thus, no action can be maintained by the parent for the possession or the mere taking away of his child; if the child is unlawfully restrained of its liberty, a writ of *habeas corpus* should be resorted to.[1] A parent may, under certain circumstances, maintain an action for the loss of the services of his minor child; but this right of action is not based upon any supposed property right to the custody, and an innocent procuring of a child to leave its home is not illegal.[2] In Maryland, it is expressly declared by statute, that no person who, in good faith, receives, harbors, persuades away or removes from a parent, guardian or master[3] any minor, for the purpose of sheltering or protecting such minor from ill-treatment or suffering, shall be held to incur any liability therefor.[4] So also, force or violence as well as deceit and stratagem, in securing the possession of children whose custody is claimed are entirely discountenanced and condemned by law, and

[1] Dowling *v.* Todd, 26 Misso. 267; Rising *v.* Dodge, 2 Duer, 42, 48.

[2] Nash *v.* Douglass, 12 Abb. Pr. N. S. 187.

The same doctrine applies to a harboring or sheltering of a wronged or ill-treated wife. Winsmore *v.* Greenbank, Willes, 577, 581; Philp *v.* Squire, Peake Add. Cas. 82; Hutcheson *v.* Peck, 5 Johns. 196; Bennet *v.* Smith, 21 Barb. 439; Glass *v.* Bennett, 89 Tenn. 478, 493.

[3] That is to say, of an apprentice.

[4] Laws 1890, ch. 8.

the courts have in a number of instances restored the custody of children to persons from whom they were taken by such means, in order that no undue advantage might be obtained in this manner.[1] A court of chancery may enjoin any person from attempting to possess himself of the person of an infant by force or other indirect or illegal means,[2] and a child must not, while going to or from court, be seized or interfered with by any one claiming its custody.[3] The use of force or violence in attempting to secure the custody of a child may amount to a civil trespass,[4] or may be punishable criminally as assault,[5] or as kidnapping.[6]

§ 51. **No Federal Jurisdiction.**—The subject of the domestic relations of husband and wife, parent and child, guardian and ward, belongs to the laws of the several states, and not to the laws of the United States, and the writ of *habeas corpus* can not be used by the judges or courts of the United States, except in cases where it is appropriate to their jurisdiction. The matter of the custody and control of infants is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. The matter of the private custody of an infant can not, therefore, be adjudicated by a Federal court upon *habeas corpus*.[7]

[1] R. *v.* Mosely, 5 E. 224, n.; C. *v.* Fee, 6 S. & R. 255; Janes *v.* Cleghorn, 54 Ga. 9; Clark *v.* Bayer, 32 O. St. 299; S. *v.* Kirkpatrick, 54 Iowa, 378.

[2] *Supra*, § 33.

[3] *Infra*, § 60.

[4] DeManneville *v.* DeManneville, 10 Ves. 52, 62.

[5] C. *v.* Coffey, 121 Mass. 66.

[6] S. *v.* Farrar, 41 N. H. 53.

[7] In re Burrus, 136 U. S. 586.

This statement, of course, has no application to legislation for the District of Columbia or the territories.

In U. S. *v.* Sauvage, 91 Fed. R. 490, the writ was applied for and issued on behalf of alien parents for the custody of their infant

§ 52. **Scope Of Remedy.**—A person held in any custody other than that of a public officer, on a criminal charge, or at the suit or instance of the government, is said to be in "private custody," as distinguished from custody under process of law.[1] Originally, the writ of *habeas corpus ad subjiciendum* was granted only in cases of detention under color of public warrant or process of law. Neither at common law nor under 31 Car. 2, c. 10 was the remedy by *habeas corpus* applicable in cases of private restraint or detention, the writ *de homine replegiando* having been, it seems, the only remedy anciently applicable in such cases.[2] The writ of *habeas corpus* was, however, from early times extended and adapted by the courts to cases of private restraint both of adults and infants. In respect to adults held in detention by private individuals, the government through its courts acts as *conservator pacis* and *custos morum*,[3] every unlawful detention or imprisonment of the citizen being deemed a breach of the public peace.[4] In regard to infants held in private detention or custody, the government acts through this writ as *parens patriæ*. The state, by virtue of its paternal authority, exercises the power of disposing of the custody as it shall be deemed best for their welfare. The courts act in this behalf solely upon the assertion of the right of the government whose powers they administer to continue or change the custody, at their discretion, allowing the infant, if competent, to elect

child, it being claimed that the proceeding was authorized under the terms of a treaty. The writ was dismissed on the ground, that no improper restraint was found to exist, and the question of jurisdiction was not considered.

[1] Wilmot's Notes, 84-87.

[2] Ib. 92-93; In re Barry, 42 Fed. R. 113; S. C., 136 U. S. 597.

[3] In re Barry, *supra*.

[4] Exp. O'Neill, 8 Md. 227; S. *v.* Glenn, 54 Ib. 572; P. *v.* Bradley, 60 Ill. 390.

for himself, otherwise making the election for him.[1] The writ is the means of bringing the infant before the court, the powers of the court in its subsequent proceedings being referable to the general jurisdiction over infants.

Jurisdiction in all such cases is exercised in accordance with the *lex fori*.[2]

§ 53. **Chancery Jurisdiction.**—When the peculiar jurisdiction of a court of chancery is invoked, by bill or petition, on behalf of an infant, its powers are of a plenary character, extending not only to the appointment and removal of guardians of every kind, but also to the control of them and the supervision of the infant's interests; but when a court of chancery issues the writ of *habeas corpus ad subjiciendum* to bring up an infant, its functions are essentially the same as those of a common-law court. The object of the proceeding, both at law and in equity, is to release from an improper detention and dispose of the custody as shall appear best for the welfare of the infant concerned, without determining mere questions of guardianship or the like.[3]

§ 54. **Suing Out Writ.**—The petition[4] which is usually the origin of the proceeding is in the nature of an information, or relation, the person presenting the same being styled the *relator* and the state, or sovereign, being the plaintiff, in whose name the writ issues and the proceeding is conducted.[5] The person to whom the writ is directed is the *respondent*, the

[1] In re Barry, *supra*.

[2] *Infra*, §§ 69-70.

[3] In re Wollstonecraft, 4 Johns. Ch. 80; P. *v.* Mercein, 8 Paige, 47.

[4] Appendix, Forms 1-2.

[5] Cobbett *v.* Hudson, 10 Eng. L. & Eq. 318; Barry *v.* Mercein, 5 How. 103, 108; P. *v.* Bradley, 60 Ill. 390.

title of such a proceeding being "*State of* ——, *ex rel.*[1] *A. B. v. C. D.*" No legal relation need subsist between the person alleged to be imprisoned or restrained and the person making the application. Any person may petition on behalf of another alleged to be wrongfully imprisoned or restrained.[2] It is immaterial, that the petitioner is an infant, or the wife of the respondent, or a person otherwise not competent to bring an ordinary action. Slight technical objections are not entertained in these cases, and, even upon technical considerations, the writ being in the name of the state, or government, the objection would be obviated.[3]

§ 55. **Writ And Return.**—The writ is in the usual form of a *habeas corpus ad subjiciendum*,[4] and may be directed to one person or to several persons, or require the production of one person or of several persons, in the latter case being technically called a writ of *habeas corpora*. It is, unless otherwise provided by statute, addressed directly to the respondent, and served by being delivered to him by any person. Under statutes obtaining in most states, a special mode of procedure obtains, when there is reason to apprehend, that the writ might otherwise be evaded. Thus, in Maryland,[5] if there is probable cause for believing, that the person said to confine or detain a child or other person is about to remove the person detained for the purpose of evading the writ of *habeas corpus*, or for any other purpose, or that he would

[1] *I. e.*, *ex relatione.*

[2] In re Hottentot Venus, 13 E. 195; Cobbett *v.* Hudson, *supra*; In re Agar-Ellis, L. R. 24 Ch. D. 317, 326; Exp. Des Rochers, 1 McAll. 68; S. C., Fed. Cas. 3,824; In re Ferrens, 8 Ben. 442; S. C., Fed. Cas. 4,746; S. *v.* Philpot, Dudl. (Ga.) 46; C. *v.* Curby, 3 Brewst. 610; S. C., 8 Phila. 372.

[3] Cobbett *v.* Hudson, *supra*; C. *v.* Briggs, 16 Pick. 203.

[4] Appendix, Forms 6, 7.

[5] Code P. G. L., art. 42, secs. 6-7.

evade or disobey the writ, this matter should be alleged in the application, which should be accompanied by affidavit or other *prima facie* proof of such probable cause, and a clause may then be inserted in the writ, requiring the sheriff of the county in which the person is detained to serve the writ and immediately bring both the person charged with the detention and the person detained before the court or judge.[1] The sheriff, under such a precept, has the same authority as under a *capias* or bench warrant and must make due return, the further proceedings being conducted substantially as in ordinary cases. The form of return may be (substantially), "*cepi*," or, "I have served the within writ, as commanded, upon A. B. and have taken said A. B. together with C. D. into my custody and have them now before the court." If he finds only one, he must bring him before the court, returning the other "*non est.*" If neither can be found, the return is "*non sunt.*" In cases where the writ is served in the ordinary mode, the return is made by the respondent.[2] In the event of a failure or refusal of the respondent to make a return, the fact of such service may be proven by an affidavit of the person who made the service.[3]

§ 56. **Same Subject.**—After service of the writ, the respondent must appear in court, at the time named therein, and make his return, as commanded, and can not ignore or avoid the mandate of the writ by relying upon alleged defects or informalities in the proceedings antecedent to the granting of the writ. If improperly issued, the writ may be quashed; but this must not be for matter that can be returned to it.[4] Slight or merely technical objections to the proceed-

[1] Appendix, Forms 2, 3, 6.
[2] *Infra*, § 56.
[3] R. v. Wright, 2 Str. 915.
[4] Carus Wilson's Case, 7 Ad. & El. N. S. 984.

ings should not prevail, especially in cases affecting the custody of infants.[1] *Habeas corpus* is a writ of right, but does not issue as of course upon mere application. The court may require proper cause to be shown for issuing the writ,[2] or may lay a rule to show cause, why it should not issue. When, however, the writ has issued, subsequent proceedings must be conducted with reference to it. The return must be responsive to the writ, not the petition.[3] The return consists of a formal statement in writing, endorsed upon or attached to the writ, signed by the person to whom the writ is directed and dated,[4] certifying to the court the facts in relation to the alleged detention. If the writ is directed to an incorporated society or institution, the return should be signed by the president or chief officer. If the alleged cause of detention is a commitment, a copy thereof should be annnexed to the return and the original produced for the inspection of the court.

The return must be accompanied by the production of the body, unless the person to be produced is in such condition as to render it dangerous to his health to bring him up, or unless he is not within the power, custody or control of the respondent, so that compliance with the mandate of the writ in this respect is matter of impossibility.[5] The return must not be at all equivocal or evasive.[6] If the body is not produced the alleged reason will be carefully investigated, with a

[1] *Infra*, § 57.

[2] In re Barry, 42 Fed. R. 113; S. C., 136 U. S. 597; In re Williamson, 26 Pa. St. 9.

[3] McGlennan *v.* Margowski, 90 Ind. 150, 153; Exp. Durbin, 102 Misso. 100.

[4] Probably not essential.

[5] Exp. Coupland, 26 Tex. 386.

[6] R. *v.* Winton, 5 T. R. 89; U. S. *v.* Williamson, Fed. Cas. 16,725; In re Williamson, *supra;* Rivers *v.* Mitchell, 57 Iowa, 193.

view to arriving at the exact truth.[1] Failure to make a proper return, or any return, is a contempt,[2] for which attachment may be issued immediately, or a rule be laid, to show cause why it should not issue. If the contempt is a continuing one, the party may be committed generally, until he purge himself of his contempt,[3] the first step in purging being, to comply with the mandate or order of the court.[4] The mere fact, that the person required to be produced is beyond the jurisdiction of the court does not defeat the writ, if it is in the power of the party to produce him.[5] The writ, however, operates as to present detention only, and can not be used to inflict punishment for a past wrongful detention,[6] nor for mere purposes of discovery;[7] and before the court can regularly pass an order as to custody, the child must be before it.[8] Removal *pendente lite* of the child or other person whose custody is in question is likewise a contempt.[9]

§ 57. **The Hearing.**—The case is heard by the court without the intervention of a jury, and hence the inquiry is commonly called the *hearing*. In proceedings of this character, courts are not governed by the strict rules of evidence or procedure applicable to the trial of ordinary issues. The fate or interest of the child whose custody is in question must not be made to depend on what the contending parties to the

[1] U. S. *v.* Green, 3 Mason, 482; S. C. Fed. Cas. 15,256.

[2] 4 Bl. Comm. 285; R. *v.* Winton, *supra;* R. *v.* Wright, 2 Str. 915; U. S. *v.* Williamson, *supra;* In re Williamson, *supra;* S. *v.* Philpot, Dudl. (Ga.) 46; In re Stacy, 10 Johns. 328.

[3] In re Williamson, *supra;* Exp. Bergman, 3 Wyom. 396.

[4] Anonymous, Lofft, 451; Buffum's Case, 13 N. H. 14.

[5] U. S. *v.* Davis, 5 Cranch C. C. 622; S. C., Fed. Cas. 14,926; Rivers *v.* Mitchell, *supra*. *Contra:* In re Jackson, 15 Mich. 417.

[6] Barnardo *v.* Ford, 1892, App. Cas. 326; Exp. Coupland, *supra*.

[7] *Infra*, § 104.

[8] P. *v.* Winston, 31 N. Y. App. Div. 121.

[9] *Infra*, § 58.

proceeding may see proper to state or to evade, nor on any artificial rules of pleading or procedure. The proceeding partakes more of the character of an *inquisition* than a *trial*, and courts will not disable themselves, by allowing technicalities to intervene, from hearing everything necessary to an enlightened discharge of their duty: the exact truth should be searched out and all mere technicalities of procedure unsparingly set aside.[1] In all cases, whether arising at law or in equity, affecting the custody of infants, the application or petition is treated as virtually that of the child, and the court is bound to do what is for its benefit, regardless of the prayer of the bill, petition or other pleading by means of which the case is presented.[2] The judge is not restricted to the ordinary modes of trial, but may examine the child privately, may avail himself of affidavits or any other reasonable sources of information which he deems proper and satisfactory, and may determine from his own knowledge.[3] The character and conduct of contesting claimants are relevant merely to the extent of their bearing upon the fitness of such parties for the trust of caring for the child, and vigilant caution should be observed that no consideration of the merits of any quarrels that so frequently figure in such contests should prevent the interests of the child from being fully guarded, or lead to any step that may prejudice it.

§ 58. **Custody Pending Hearing.**—When brought up by *habeas corpus*, an infant or other person thus produced is, in legal contemplation, in the custody of the court or officer hearing the case and subject to the

[1] In re Gregg, 5 N. Y. Leg. Obs. 265; Gishwiler *v.* Dodez, 4 O. St. 615; Corrie *v.* Corrie, 42 Mich. 509.

[2] DeManneville *v.* DeManneville, 10 Ves. 52, 59; In re Bullen, 28 Kans. 781, 785.

[3] Cowls *v.* Cowls, 8 Ill. 435; Dumain *v.* Gwynne, 10 Allen, 270; In re Doyle, 1 Clarke Ch. (N. Y.) 154.

order of the court or judge, from day to day, until the matter is disposed of, and the court or judge may make such *interim* arrangements in regard to the custody as may be deemed expedient.[1] A removal of the child or other person thus brought up, *pendente lite*, is a contempt.[2] In Maryland, it is expressly declared by statute, that a minor brought up by *habeas corpus* in private custody is deemed to be in the custody and subject to the order of the court or judge issuing the writ or hearing the case; and the court or judge may adjourn the hearing from time to time, and shall not allow the proceedings to be controlled by the parties thereto, or any of them; and it is not within their power to dismiss the case or settle it.[3]

§ 59. **Final Order.**—The final order may be in the form[4] of a restoration to the custody of the respondent, or a confiding to the custody of either of the contending parties, or a third party, or a discharge or setting at liberty of the infant. If the writ has been improperly or improvidently issued, it may be dismissed or quashed. Disobedience to such an order, or a molesting or disturbance of the infant in the care of the person to whose custody it has been confided is punishable as a contempt.[5]

§ 60. **Privilege Redeundo.**—It is especially the duty of the courts to guard against a use of the writ of *habeas corpus* for the purpose of getting an infant

[1] *Supra*, § 24; In re Kaine, 14 How. 103; Barth *v.* Clise, 12 Wall. 400; Deringer *v.* Deringer, 10 Phila. 190; Matson *v.* Swanson, 131 Ill. 255.

[2] P. *v.* Kearney, 21 How. Pr. 74.

[3] Laws 1890, ch. 70.

[4] Appendix, Forms 18-23.

[5] C. *v.* Nutt. 1 P. A. Browne (Pa.), 143; C. *v.* Reed, 59 Pa. St. 425; C. *v.* Hamilton, 6 Mass. 273; C. *v.* Maxwell, 6 L. R. 214.

abroad with the design of seizing him upon his return from court.[1] A child brought before a court upon *habeas corpus* must not be seized or molested by any one claiming the custody either in coming or in returning.[2] From an early day, a practice has obtained of sending an officer of the court with infants, if there was any apprehension of resort to violence, in order that they might be fully protected.[3]

§ 61. **Special Directions.**—The authority of the courts, when infants are brought up by *habeas corpus* in private custody, rests upon the broad foundation of the general jurisdiction over infants, the *parens patriæ* of the state,[4] and the court's power in relation to an infant thus before it is not limited to the passage of an order as to the custody. Directions may be given as to access to such infants by parents or others, and these directions are sometimes so specific and circumstantial as to border closely upon orders in chancery. The practice to make such orders is well established.[5] The courts may preserve their control over infants in such cases; an order may be passed, that an infant be produced, whenever the court requires; it may be required to be kept within the jurisdiction of the court; and bond may be taken, to insure compliance with any such direction.[6] In Maryland, it is expressly declared by statute, that "any court or judge disposing of the custody of a minor upon *habeas corpus* may

[1] R. *v.* Clarkson, 1 Str. 444.

[2] Exp. Hopkins, 3 P. Wms. 151.

[3] R. *v.* Clarkson, *supra;* In re Lloyd, 3 M. & G. 547; In re McDowle, 8 Johns. 328; S. *v.* Baird, 19 N. J. Eq. 481, 483.

[4] *Supra*, §§ 46, 49, 52.

[5] C. *v.* Addicks, 5 Binney, 520; C. *v.* Nutt, 1 P. A. Browne (Pa.), 143; C. *v.* Smith, 1 Brewst. 547; S. *v.* Baird, 18 N. J. Eq. 194; In re Bort, 25 Kans. 308.

[6] Deringer *v.* Deringer, 10 Phila. 190.

assume and retain jurisdiction over such minors in as ample a manner as a court of chancery or judge of a court of chancery upon bill or petition, and may pass such other and further orders in relation to his care and custody as may be deemed just and proper."[1]

§ 62. **Res Judicata.**—The doctrine of *res judicata* is generally held to apply to the determination of controversies upon the proceeding by *habeas corpus* involving the custody of infants. The adjudication as to the proper custody has been held conclusive in any subsequent proceeding by *habeas corpus* involving the same state of facts.[2] It is held sufficient, that the respondent and the person detained are the same: the relators may be different.[3] A mere refusal to release or discharge any person from an alleged improper commitment or detention is not generally held conclusive upon such person himself.[4] The application of the doctrine of *res judicata* to proceedings by *habeas corpus*, to the extent thus indicated, appears reasonable and proper; but the principle should not to be extended so as to preclude the infant itself from securing a change of custody when such change is for its benefit, nor so as to preclude the courts, under any proper circumstances, from exercising their protective powers over infants.[5] There appears, at least, to be no reason

[1] Laws 1890, ch. 70.

[2] Mercein *v.* P., 25 Wend. 64; In re Price, 12 Hun, 508; Weir *v.* Marley, 99 Misso. 484; S. *v.* Bechdel, 37 Minn. 360; Brooke *v.* Logan, 112 Ind. 183.

[3] In re Da Costa, 1 Park. Cr. R. 129; McConologue's Case, 107 Mass. 154, 171.

[4] Exp. Kaine, 3 Blatchf. C. C. 1; S. C., Fed. Cas. 7,597; Exp. Cuddy, 40 Fed. R. 62; P. *v.* Brady, 56 N. Y. 182; In re Snell, 31 Minn. 110; In re Reynolds, 6 Park. Cr. R. 276, 321; Exp. Scott, 1 Dak. 140

[5] *Infra*, § 77; Slack *v.* Perrine, 9 App. D. C. 128.

why an order in relation to the custody should not be so framed as to enable the court itself to alter the custody when deemed expedient;[1] and it may be questioned, whether, in the absence of an express reservation to this effect, the power to modify the order as to the custody is not always implied.

[1] Appendix, Forms 19, 21-25.

## CHAPTER 5

### Probate And Testamentary Guardians

§ 63. **Probate Guardians.**—Probate guardians are guardians appointed by special local tribunals, known as orphans', ordinary's, surrogate or probate courts, generally over the person and estate, sometimes over only the one, of orphans or other designated classes of children, whose functions, powers and duties are regulated by statutes. In the selection of such guardians, the interests and welfare of the infant are matters of paramount consideration,[1] and, if the infant has sufficient discretion, its reasonable wishes and preferences should be consulted by the court.[2] Jurisdiction to make the appointment is in the court of the child's domicile, not residence;[3] and, this jurisdiction cannot be defeated by the removal of the infant to another place.[4] The regularity of the appointment cannot be assailed collaterally by third parties,[5] except upon jurisdictional grounds,[6] and the

[1] Desribes *v.* Wilmer, 69 Ala. 25, 28; Badenhoof *v.* Johnson, 11 Nev. 87; Lefever *v.* Lefever, 6 Md. 472; Albert *v.* Perry, 14 N. J. Eq. 540; In re Stockman, 71 Mich. 180, 191.

[2] Lefever *v.* Lefever, *supra.*

[3] Jenkins *v.* Clark, 71 Iowa, 552; Boyd *v.* Glass, 74 Ga. 253; Allgood *v.* Williams, 92 Ala. 551; DeJarnett *v.* Harper, 45 Mo. App. 415. *Cf.* In re Rice, 42 Mich. 528; Taney's App., 97 Pa. St. 74.

[4] Shorter *v.* Williams, 74 Ga. 539.

[5] Simpson *v.* Gonzalez, 15 Flor. 9; Shumard *v.* Phillips, 53 Ark. 87; Farrar *v.* Olmstead, 24 Vt. 123; Davis *v.* Hudson, 29 Minn. 27; Walker *v.* Goldsmith, 14 Or. 125; Redman *v.* Chance, 32 Md. 42, 51; Kramer *v.* Mugele, 153 Pa. St. 493.

[6] Sears *v.* Terry, 26 Conn. 273.

guardian and his sureties are also debarred from questioning the validity of the appointment.[1]

§ 64. **Testamentary Guardians.**—Testamentary guardianship has its origin in stat. 12 Car. 2, c. 24, and hence testamentary guardians are sometimes called *statute* guardians.[2] This species of guardianship, at least as understood at the present day, was unknown to the common law.[3] The appointment under this statute supersedes the functions of all other guardians[4] and extends to the person and estate. It does not authorize the appointment of a guardian for an illegitimate child.[5] Testamentary guardianship is generally adopted in this country; but the legal incidents of the office are in most states modified and regulated by legislation. Authority to appoint a testamentary guardian is now generally given to the mother.[6] In England, the "Guardianship Of Infants Act," 49 & 50 Vict., c. 27, places the mother upon an entire equality with the father in this respect.[7] The appointment should be in language sufficiently precise to make it evident, that the parent wishes to confer the care and nurture of the child, no precise formula being necessary.[8]

§ 65. **Text Of Statute.**—The sections of 12 Car. 2, c. 24, relating to the appointment and functions of testamentary guardians are as follows:

[1] Fox *v.* Minor, 32 Cal. 111; Speight *v.* Knight, 11 Ala. 461; Hines *v.* Mullins, 25 Ga. 696. *Cf.* Pannill *v.* Calloway, 78 Va. 387.

[2] 1 Bl. Comm. 462.

[3] Exp. Earl of Ilchester, 10 Ves. 348. 370; Desribes *v.* Wilmer, 69 Ala. 25; In re Schmidt, 77 Hun, 201.

[4] Ramsay *v.* Thompson, 71 Md. 315.

[5] Ramsay *v.* Thompson, *supra.*

[6] In Maryland, by Code P. G. L., art. 93, sec. 148.

[7] In re X, 1899, 1 Ch. 526.

[8] Desribes *v.* Wilmer *supra;* In re Van Houten, 3 N. J. Eq. 220.

8. Where any person hath or shall have any child or children under the age of one and twenty years and not married at the time of his death, it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at the time in *ventre sa mere*, or whether such father be within the age of one and twenty years, or of full age, by his deed, executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of one and twenty years, or any lesser period, to any person or persons, in possession or remainder, other than popish recusants; and such disposition of the custody of such child or children made since the 24th of February, 1645, or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise; and such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid shall and may maintain an action of ravishment of ward or trespass against any person or persons which shall wrongfully take away or detain such child or children for the recovery of such child or children, and shall and may recover damages for the same in said action for the use and benefit of such child or children.

9. Such person or persons to whom the custody of such child or children hath been or shall be disposed or devised shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements and hereditaments of such child or children and also the custody, tuition and management of the goods, chattels and personal estate of such

child or children, till their respective age of one and twenty years, or any lesser time, according to such disposition aforesaid, and may bring such action or actions in relation thereunto as by law a guardian in common socage might do.

§ 66. **Guardians As Custodians.**—Whether the creation of the guardian be, on the one hand, by deed or will, or, on the other hand, by appointment of a probate court or other tribunal, the powers and duties of the office are essentially the same, subject, however, to the control and supervision of chancery.[1] The custody of the person of the ward is an incident of the guardian's office.[2] The English common-law courts, at one period, felt themselves bound, in proceedings by *habeas corpus*, to hold, that there was no discretion to refuse the guardian's application even as against the mother, and that they must hand over the child to the custody of the guardian as being the only custody legally free from restraint;[3] and even the High Court of Chancery felt itself at liberty to leave the child with the mother only under very peculiar circumstances.[4] This condition of affairs has been entirely reformed in England.[5] In the United States, it is sometimes provided by statute, that the widowed mother, if not otherwise unfit, shall have the custody as against a specially appointed guardian; but, independently of any such provision, a child would not be given into such guardian's custody upon the ground of any supposed legal right in him.[6]

[1] *Supra*, § 27.

[2] Burger *v.* Frakes, 67 Iowa, 460.

[3] R. *v.* Isley, 6 Nev. & M. 730; S. C., 5 Ad. & El. 441; In re Andrews, L. R. 8 Q. B. 153.

[4] Talbot *v.* Earl of Shrewsbury, 4 My. & Cr. 672.

[5] *Supra*, § 37.

[6] *Infra*, § 67.

§ 67. **Same Subject.**—Guardianships are granted for the benefit of the infant and not of the guardian. No guardian can be permitted to set up any claim that will conflict with the interests, welfare or happiness of his ward. The doctrine, that in the determination of the question of custody, the welfare of the infant is the paramount consideration to which all other considerations must yield[1] applies to parents and, *a fortiori*, to specially appointed guardians. Courts of equity possees controlling and superintending power over all guardians and will take the custody from the guardian, whenever the interests of the ward require it.[2] In proceedings by *habeas corpus*, according to the law now firmly established, the courts may, in their discretion, award the custody to a probate or testamentary guardian, or withhold it from him, being controlled in this matter entirely by a consideration of what appears to be demanded by the best interests of the child;[3] and it is immaterial, whether the child, at the time of application is out of the possession of the guardian, or is brought up in his possession.[4]

§ 68. **Change of Ward's Residence.**—In the case of infants who are wards of court, it is with jealous reluctance, that the English courts permit them to be carried out of the jurisdiction, even though it be within the territory of Great Britain;[5] and, independently of its jurisdiction over its wards, a court of chancery has power to restrain either the natural or

[1] *Supra*, § 41.

[2] *Supra*, § 27.

[3] Foster *v.* Alston, 6 How. (Miss.) 406; Ward *v.* Roper, 7 Humph. (Tenn.) 111; C. *v.* Hammond, 10 Pick. 274; In re Welch, 74 N. Y. 299; Kelsey *v.* Green, 69 Conn. 291.

[4] *Supra*, § 49.

[5] DeManneville *v.* DeManneville, 10 Ves. 52; Campbell *v.* Mackay, 10 My. & Cr. 31; Dawson *v.* Jay, 27 Eng. L. & Eq. 451; In re Medley, 6 Ir. R. Eq 339.

specially appointed guardian from removing an infant out of the jurisdiction, whenever such removal is deemed injurious to the child's welfare.[1] In the United States, it has been held, that a mere change of residence from one portion of the same sovereignty to another, as from one county to another, is within the scope of the guardian's authority, as no rights are impaired or affected, but there is simply a substitution of one local authority in the place of another, all under the same laws and jurisdiction.[2] A change of domicile, however, stands upon a different footing. While there is much conflict of opinion and ruling upon this point,[3] the preponderance of authority favors the proposition, that a specially appointed guardian cannot change the domicile taken by his ward at the place of his birth or acquired from the father at the latter's death, as a matter of course; but such change may be permitted, if not detrimental to the ward and if undertaken in entire good faith.[4]

§ 69. **Foreign Guardians.**—The powers and authority of guardians are local and, generally speaking, circumscribed by the jurisdiction of the government which clothed them with the office.[5] A foreign guardian will not in any case be allowed to exercise an authority repugnant to local institutions and local policy;[6] but, subject to this limitation, his authority

[1] *Supra*, § 33.

[2] Lamar *v.* Micou, 112 U. S. 452, 472.

[3] Story Confl. Laws, 8 ed., 709; 2 Kent. Comm. 227, n. b.

[4] Jacobs Domicile, § 263; Lamar *v.* Micou, *supra;* Corrie's Case, 2 Bland (Md.), 488, 504; Johnson *v.* Copeland, 35 Ala. 521; Daniel *v.* Hill, 52 Ib. 430; Marheineke *v.* Grothaus, 72 Misso. 204; Pedan *v.* Robb, 8 Ohio, 227; Townsend *v.* Kendall, 4 Minn. 412; Woodward *v.* Woodward, 87 Tenn. 644.

[5] Story Confl. Laws, § 499; Johnstone *v.* Beattie, 10 Cl. & F. 42; Morrell *v.* Dickey, 1 Johns. Ch. 153; Kraft *v.* Wickey, 4 Gill & Johns. (Md.) 332; Leonard *v.* Putnam, 51 N. H. 247.

[6] *Infra*, § 70.

should ordinarily be supported, if there is no danger of abuse or suspicion of detriment to the ward.[1]

§ 70. **Same Subject.**—The determination of the question, whether or not an infant is to be delivered up to its guardian depends entirely upon the *lex fori*. The courts exert their powers in such cases in accordance with the policy of the place where the child is found. Even the parental relation carries with it no authority or control beyond that conferred by the laws of the country where it is sought to exert it. The petition of a foreign parent or guardian is entertained, not as a matter of strict right, but as a matter of comity. If it should appear, that the surrender and restoration to a foreign guardian would not debar the infant from any personal rights or privileges to which it would be entitled under the laws of the state appealed to through its courts and would be conducive to the child's welfare and promote its interests, it would be the duty of the court to confide to the foreign guardian custody of the person. It matters not, whether the parent or guardian is a resident or non-resident, an alien or native—the question to be considered in the determination of the custody is that of the child's welfare,[2] and, if the child is of sufficient discretion, its reasonable wishes and preferences must also be consulted by the court.[3]

[1] Wharton Confl. Laws, § 268; Dawson *v.* Jay, 27 Eng. L. & Eq. 451; Nugent *v.* Vetzera, L. R. 2 Eq. 704; Townsend *v.* Kendall, 4 Minn. 412.

[2] Johnstone *v.* Beattie, 11 Cl. & F. 42, 114; In re Barry, 42 Fed. R. 113, 133-4; S. C., 136 U. S. 597, 625-6; Woodworth *v.* Spring, 4 Allen, 321; In re Rice, 42 Mich. 528; In re Stockman, 71 Ib. 180, 193; C. *v.* Sage, 160 Pa. St. 399.

[3] C. *v.* Sage, *supra*.

## CHAPTER 6

### Divorce Proceedings

§ 71. **Nature Of Jurisdiction.**—Jurisdiction over suits for divorce is, in the United States, generally vested in the courts of chancery, and the mode of procedure is similar to that prevailing in such courts in other suits with some slight differences arising out of the peculiar nature of the interests involved. Upon principles of equity, when the aid of a court of chancery is invoked with reference to an infant, such infant immediately becomes a ward of the court, although the aid is invoked only incidentally to some other matter which is the principal subject of the controversy.[1] Hence, upon the institution of a suit for divorce, if there be a prayer, by bill or petition, in relation to the disposal of the custody of the infant children of the parties, such children become wards of the court and the benignant and beneficial jurisdiction which chancery exercises over the interests of infants fully attaches with all the incidents that attend chancery proceedings in relation to infants.[2]

§ 72. **Effect Upon Other Proceedings.**—When once the jurisdiction of chancery over the person of an infant attaches, this jurisdiction is so ample and far-reaching, that occasion can rarely, if ever, arise for the interposition of any other court. Hence, if a suit for divorce and the custody of the children is pending, a writ of *habeas corpus* issued during the

[1] *Supra*, §§ 24-25.

[2] Hansford *v.* Hansford, 10 Ala. 561. *Contra:* Hopkins *v.* Hopkins, 39 Wis. 167.

pendency of such suit should be discharged and the parties remitted to the chancery court for relief.[1]

§ 73. **Temporary Custody Pending Suit.**— Whenever the custody of infants is the subject of suit, the courts of chancery have full power to make interim arrangements for such custody.[2] This power is to be exercised primarily for the benefit of the infant concerned,[3] and the courts may make any orders in relation to the temporary custody or incidental thereto, regarding such matters as access to the child by the party not having the custody, the keeping of the child within the jurisdiction of the court and the like, as may be deemed just and proper under the circumstances of each particular case.[4] These are matters so entirely discretionary and so much dependent upon special circumstances, that no general directions can be given.

§ 74. **Custody Upon Determination Of Suit.**— Upon the dissolution of the marriage, or judicial separation of the parents, the court, looking mainly to the welfare and interest of the children in its award of the custody, will place them where such interest and welfare will be best promoted and their happiness secured.[5] In many states, it is provided by statute, that the courts may exercise a more or less liberal discretion in such cases; but such statutes may be regarded as merely declaratory of the common law; and, it is believed, most tribunals would afford the relief authorized by the statutes independently of

[1] *Supra*, § 24.

[2] In re Welch, 74 N. Y. 299.

[3] Green *v.* Green, 52 Iowa, 402.

[4] Philip *v.* Philip, 41 L. J. P. 89; S. C., 27 L. T. 592; P. *v.* Paulding, 15 How. Pr. 167.

[5] Adams *v.* Adams, 1 Duv. (Ky.) 167; Cole *v.* Cole, 23 Iowa, 433; Lyle *v.* Lyle, 86 Tenn. 372; Wand *v.* Wand, 14 Cal. 512; Eckhard *v.* Eckhard, 29 Neb. 457.

the legislative direction. While the principle making the welfare of infants the paramount consideration in the disposal of their custody is universal,[1] the pendency of an action for divorce or judicial separation, or the mere fact of a separation of the parents, may be said to require a more than ordinarily free application of the rule.[2] Independently of the consideration of the welfare of the infant, the principle also applies, as in other cases,[3] that when an infant has arrived at the age of discretion to choose for itself, the court will consult its wishes and preferences in the determination of the custody.[4]

§ 75. **Same Subject.**—In awarding the custody of the children upon a decree for divorce or separation, the courts look primarily to the fitness of the parties and their adaptability to the task of caring for the children, taking into consideration age, sex, state of health and other circumstances in the lives of the children. The custody is ordinarily, but not necessarily or as a matter of course, confided to the party prevailing in the suit. Guilt or innocence is material only so far as it affects the question of relative fitness for the care of the children. It is the duty of the courts in such cases to protect the interests of the children, not to gratify the feelings and wishes of the parties or mete out rewards and punishments.[5] An agreement between the parties as to the custody of the children is not at all controlling.[6] Some children may be confided to one party and some to the other,

[1] *Supra*, § 22.

[2] Green *v.* Green, 52 Iowa, 403.

[3] *Supra*, §§ 44-46.

[4] Hewitt *v.* Long, 76 Ill. 399; Voullaire *v.* Voullaire, 45 Misso. 602; Williams *v.* Williams, 23 Flor. 324, 325.

[5] English *v.* English, 32 N. J. Eq. 738; Luthe *v.* Luthe, 12 Color. 421; Welch *v.* Welch, 33 Wis. 534; Lusk *v.* Lusk, 28 Misso. 91.

[6] *Supra*, § 11; Thorndike *v.* Rice, 24 L. R. 19.

or the custody may be confided to a third person.[1] Younger children and female children of all ages are ordinarily confided to the mother and children of a near age ordinarily kept together.[2] If a child especially requires its mother's care, custody will be confided to her even though the decree was passed because of her adultery.[3] The entire matter is one largely of discretion, the exercise of which can not be regulated by definite rules.

§ 76. **Effect Of Proceedings Upon Custody.**—The question of the custody of the infant children of the parties is not necessarily dependent upon or determined by the action of the court in relation to the divorce. Even though the relief prayed be only the granting of alimony, without a divorce, the court may dispose of the custody of the children;[4] and when a divorce is prayed and denied, the court may yet award such custody. So, on the other hand, when a divorce merely has been applied for, but the court's jurisdiction as to the matter of custody has not been invoked, the parties may subsequently proceed, by *habeas corpus* or other appropriate remedy, to have the custody of their children adjudicated in a separate proceeding.[5]

§ 77. **Res Judicata.**—When a court of chancery has passed upon the question of custody in a divorce suit, its decree is *res judicata* and cannot be collaterally inquired into or impeached. The decree is of permanent obligation, so long as it remains unmodified. A change of custody cannot afterwards be effected

[1] Adams *v.* Adams, 1 Duv. (Ky.) 167; Rice *v.* Rice, 21 Tex. 58, 67; Voullaire *v.* Voullaire, 45 Misso. 602.

[2] *Supra*, § 43.

[3] *Ib.*

[4] Prather *v.* Prather, 4 Desaus. (S. C.) 33; Cowls *v.* Cowls, 8 Ill. 435.

[5] Cocke *v.* Hannum, 39 Miss. 423, 438.

through the medium of the jurisdiction of any other court.[1] According to the view of some courts, however, while the decree in a divorce suit as to the custody of the children binds the parties *inter sese*, so that they will not be allowed to retry the matters thus determined, the children themselves are not thus bound, and in a subsequent proceeding by *habeas corpus* involving the question of proper custody, the court before which the proceeding is pending is not concluded by the decree in the divorce suit as to the best interests of the children.[2] The more correct view seems to be, that after the passage of a decree awarding the custody, the infants remain wards of the court.[3] The court may require them to be kept within its jurisdiction[4] and provide for the access to them at reasonable times and places of the party not having the custody,[5] but may also restrain such party from any improper interference with the custody.[6]

§ 78. **Effect Of Decree Upon Guardianship.**— The passage of a decree in a divorce suit giving the custody of the infant children of the parties to the mother has been held to take away the father's right to appoint a testamentary guardian.[7] On the other hand, it is generally held, that the mere fact of the granting of a divorce and the award of the custody of

[1] Hoffman *v.* Hoffman, 15 O. St. 427; Williams *v.* Williams, 13 Ind. 523; Dubois *v.* Johnson, 96 Ib. 6; Leming *v.* Sale, 128 Ib. 317.

[2] In re Bort, 25 Kans. 308; Avery *v.* Avery, 33 Ib. 1; P. *v.* Allen, 40 Hun, 611, 621.

[3] Miner *v.* Miner, 11 Ill. 43; Hewitt *v.* Long, 76 Ib. 399.

[4] Miner *v.* Miner, *supra;* Hewitt *v.* Long, *supra;* Ryce *v.* Ryce, 52 Ind. 64.

[5] Miner *v.* Miner, *supra;* Hewitt *v.* Long, *supra;* Wand *v.* Wand, 14 Cal. 512, 518; S. *v.* English, 31 N. J. Eq. 543, 548; Hill *v.* Hill, 49 Md. 450, 454; Sherwood *v.* Sherwood, 56 Iowa, 608; Haley *v.* Haley, 44 Ark. 429.

[6] *Supra*, § 33.

[7] Wilkinson *v.* Deming, 80 Ill. 342; Hill *v.* Hill, 49 Md. 450.

the infant children of the parties to the mother does not affect the father's liability for their maintenance, and the allowance of alimony to the wife is, in such cases, not ordinarily to be construed into an allowance also for the support of the children.[1] The decree may be so framed as to be binding upon the father's estate.[2] Under special circumstances, an award of the custody to the mother has been held to carry with it the obligation on her part to maintain and provide for the children.[3] The remedy to enforce any liability devolving upon the father in such cases is ordinarily to be sought in the court disposing of the divorce suit, not in a common-law action.[4]

§ 79. **Amending Decree.**—In a number of the states, power is conferred upon the courts by statutes to modify or amend their decree in relation to the custody of the children.[5] Independently of such statutes, it has been held, that the jurisdiction of the court continues over the children as its wards and that, in the exercise of chancery jurisdiction, the court may alter or modify its order as to their care and custody as circumstances may require.[6] In Indiana, it is held, that there can be no amendment, unless the power to modify it is expressly reserved in the decree itself.[7]

§ 80. **Extra-Territorial Effect.**—It has been held, that the provision of the constitution of the United

[1] In re Welch, 48 Conn. 342; Plaster *v.* Plaster. 47 Ill. 290; Holt *v.* Holt, 42 Ark. 495; Pretzinger *v.* Pretzinger, 45 O. St. 452. *Contra:* Johnson *v.* Johnson, 86 Ill. App. 152, 155.

[2] Miller *v.* Miller, 64 Me. 484.

[3] Fulton *v.* Fulton, 52 O. St. 229.

[4] Brow *v.* Brightman, 136 Mass. 187.

[5] In Maryland, by Code P. G. L., art. 16, sec. 37.

[6] Cowls *v.* Cowls, 8 Ill. 435; Miner *v.* Miner, 11 Ib. 43; Hoffman *v.* Hoffman, 15 O. St. 427, 435; Neil *v.* Neil, 38 Ib. 558, McGill *v.* McGill, 19 Flor. 341, 350; Cornelius *v.* Cornelius, 31 Ala. 479; Holt *v.* Holt, 42 Ark. 495.

[7] Sullivan *v.* Learned, 49 Ind. 252; Dubois *v.* Johnson, 96 Ib. 6.

States (art. 4, sec. 1), that "full faith and credit shall be given in each state to the public acts and judicial proceedings of every other state" has no application to orders in divorce cases in relation to the custody of the infant children of the parties.[1] The decree, in such cases, has not the force of an estoppel, or the conclusive effect due to a judgment; but it may be regarded as a fact or circumstance bearing upon the discretion to be exercised in the matter of determining an application for the disposal of such custody, without, however, dictating or controlling the action of the court.[2] When the children of the parties are not actually residents of the state in whose courts divorce proceeding are pending, a decree attempting to affect their custody will not be regarded as valid elsewhere.[3]

[1] In re Bort, 25 Kans. 308.
[2] P. v. Allen, 105 N. Y. 628.
[3] Kline v. Kline, 57 Iowa, 386; In re Vetterlein, 14 R. I. 378.

## CHAPTER 7

### Illegitimate Children

§ 81. **General Statement.**—Illegitimate children, or bastards, are persons begotten and born out of lawful wedlock. Not only children born before marriage, but those born so long after the death of the husband as to destroy all presumption of their being his and also all children born during the absence of the husband, so long and continued, that no access to the mother can be presumed are reputed bastards; but the question of access or non-access is one of fact, to be determined as other similar questions, and, in the case of the death of the husband, there is no precise period fixed by law as the *ultimum tempus gestationis*, the modern doctrine leaving this matter to be governed by circumstances. If a child be born immediately after marriage, it is still a legitimate child, unless non-access of the husband prior to the marriage be sufficiently proven. *Pater est quem nuptiæ demonstrant.*[1] By the civil and canon laws, a subsequent intermarriage of the parents legitimates the children born prior thereto, and this rule has been adopted in a number of the states. Thus, in Maryland, subsequent intermarriage of the parents and acknowledgment of the child by the father operate to legitimate it and capacitate it to inherit and transmit inheritance, as if born in wedlock.[2]

§ 82. **Legal Status.**—In legal contemplation, under the common-law system, a bastard is *nullius filius* and

[1] Jackson *v.* Jackson, 82 Md. 17. (The father is he whom the marriage points out.)

[2] Code P. G. L., art. 46, sec. 29.

is incapable of inheriting as heir or of having heirs but of his own body. He has no inheritable blood and is incapable of taking under a devise worded under such general terms as to the testator's children: it must appear from the context of the deed or will under which such child claims, that illegitimate offspring was intended.[1] The rigor of the strict common law in this respect has been modified in many of the states by statute and, according to equitable doctrines held in a number of cases arising in chancery, bastards have been held entitled to a strong degree of protection in matters of property right.[2]

In Maryland, illegitimate children and their issue inherit from the mother, from each other and from descendants of each other; if they die intestate, leaving no descendants, or brothers or sisters, or descendants of brothers or sisters, the mother inherits; if the mother is dead, her heirs inherit.[3]

§ 83. **Custody.**—It is now well established, that the mother of an illegitimate child is its natural guardian and legal custodian.[4] The natural guardianship of the father is not recognized to the same extent. Independently of statutes, he is under no legal obligation to maintain his illegitimate child.[5] It has been doubted, whether he has any claim to be recognized

[1] Appel *v.* Byers, 98 Pa. St. 479.

[2] 2 Kent. Comm. 214-17; Barela *v.* Roberts, 34 Tex. 554; Estep *v.* Mackey, 52 Md. 592.

[3] Code P. G. L., art. 46, sec. 30; Ib., art. 93, sec. 134; Brewer *v.* Blougher, 14 Pet. 178.

[4] Reg. *v.* Nash, 10 Q. B. D. 454; Reg. *v.* Barnardo, 1891, 1 Q. B. 194, 207; In re Doyle, 1 Clarke Ch. (N. Y.) 154; Friesner *v.* Symonds, 46 N. J. Eq. 521, 527; Ramsay *v.* Thompson, 71 Md. 315; Dalton *v.* S., 6 Blackf. (Ind.) 357; In re Nofsinger, 25 Mo. App. 116; Wright *v.* Wright, 2 Mass. 109; Hudson *v.* Hills, 8 N. H. 417; Lawson *v.* Scott, 1 Yerg. (Tenn.) 92.

[5] Nine *v.* Starr, 8 Or. 49; Easley *v.* Gordon, 51 Mo. App. 637.

as the legal custodian;[1] but the weight of reason and authority supports the proposition, that as between the father and a mere stranger, the former is ordinarily to be regarded as the proper custodian.[2]

§ 84. **Same Subject.**—As in the case of legitimate children, no one is entitled to the possession or custody of the child as a mere matter of right or legal claim. The welfare and happiness of the child itself constitute the paramount consideration in the determination of all questions affecting its custody. The parent is not entitled, upon a proceeding by *habeas corpus* or otherwise, to have the child delivered up into his or her custody as a matter of right, and the child may be removed from such custody, if there are circumstances of ill-treatment or the like.[3] The power of the courts, whether of law or of chancery, to intervene in such cases is not less extensive than in the case of legitimate children.[4]

§ 85. **Same Subject.**—In addition to the operation of the principle, that the consideration of the best interests of the child overbears any mere claim of the parent to the custody, other considerations affecting the determination of the custody obtain as in the case of legitimate children. The wishes and choice of the child should be taken into proper consideration in the determination of the custody,[5] as in all other cases; and the same principles prevail as to voluntary trans-

[1] Jones *v.* Stockett, 2 Bland (Md.), 409, 430; Matthews *v.* Hobbs, 51 Ala. 210; Hudson *v.* Hills, *supra*.

[2] In re Kerr, 22 L. R. Q. B. Ir. 642; P. *v.* Cooper, 8 How. Pr. 288, 293; Pote's App., 106 Pa. St. 574, 581; Barela *v.* Roberts, 34 Tex. 554.

[3] Jones *v.* Stockett, 2 Bland (Md.), 409, 430; P. *v.* Kling, 6 Barb. 366; Robalina *v.* Armstrong, 15 Ib. 247; In re Nofsinger, 25 Mo. App. 116.

[4] Reg. *v.* Barnardo, 1891, 1 Q. B. 194, 211.

[5] In re Doyle, 1 Clarke Ch. (N. Y.) 154.

fers or assignments of custody as in the case of legitimate children.

§ 86. **Construction Of Statutes.**—Statutes have been generally enacted throughout the United States modifying the rigor of the common law in relation to the legal status of bastards. The relaxation by the laws of so many states of the severity of the common law rests upon the principle, that the relation of parent and child, which exists in this unhappy case in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity. In accordance with this principle, it has been held, that such statutes should receive a liberal construction, favoring the interests of such children. "The law should never receive such a construction as would tend to dry up the natural sources of affection." The child, innocent of the guilt of its parents, should not be deprived of all claim to their love and protection; neither should the parents be deprived of the privilege of assuming voluntarily the duties and responsibilities which, by the law of most states, are forced upon at least one of them.[1]

[1] 2 Kent Comm. 231; Barela *v.* Roberts, 34 Tex. 554; Todd *v.* Weber, 95 N. Y. 181.

## CHAPTER 8

### APPRENTICES

§ 87. **Binding Out.**—A father may, at the common law, bind out his infant son for the purpose of learning some useful art or trade.[1] The mother possesses no such power.[2] The binding must be to a person who is himself *sui juris*,[3] but not necessarily to a natural person, or an individual. A firm or a body corporate may take an apprentice.[4] The infant must assent,[5] and the binding must be by deed.[6] The infant, strictly speaking, can not bind himself; but the contract in such cases is merely voidable.[7] While the father may bind his son, subject to the limitations above stated, as an apprentice, he can not bind him as a mere servant, or assign the child's services for a consideration to enure to himself.[8]

§ 88. **Statutory Regulations.**—Stat. 5 Eliz., c. 4 regulated apprenticeships throughout England, except

[1] Doane *v.* Covel, 56 Me. 527; Peters *v.* Lord, 18 Conn. 337; In re McDowle, 8 Johns. 328; Crombie *v.* McGrath, 139 Mass. 550; Phelps *v.* Pittsburg R. R., 99 Pa. St. 108.

[2] Baker *v.* Lauterbach, 68 Md. 64.

[3] R. *v.* Guildford, 2 Chitty, 284.

[4] Burnley Society *v.* Casson, 1891, 1 Q. B. 75.

[5] R. *v.* Arnesby, 3 B. & Al. 584; Musgrove *v.* Kornegay, 7 Jones (N. C.), 71. *Cf.* In re McDowle, *supra*.

[6] R. *v.* Ditchingham, 4 T. R. 769; Squire *v.* Whipple, 1 Vt. 69; Phelps *v.* Pittsburg R. R., *supra*.

[7] Gylbert *v.* Fletcher, Cro. Car. 179; Stone *v.* Dennison, 13 Pick. 1; Harney *v.* Owen, 4 Blackf. (Ind.) 337; Clark *v.* Goddard, 39 Ala. 164.

[8] U. S. *v.* Bainbridge, 1 Mason, 71; S. C., Fed. Cas. 14,497; Resp. *v.* Keppele, 2 Dall. 197; C. *v.* Baird, 1 Ashm. (Pa.) 267; Nickerson *v.* Easton, 12 Pick. 110.

in the City of London and other places where local customs existed, and made void all contracts not executed in conformity thereto. This statute has been held to be inapplicable to our circumstances,[1] the entire subject, in the United States, being generally regulated by local statutes. There can be no apprenticeship by custom in derogation of the mandate of such statutes.[2] Provisions generally obtain as to the binding out of destitute or orphaned minors by overseers of the poor or other officials. Such legislation must be so construed as to carry out its protective design, without prejudice to the interests and welfare of the minors,[3] and the power of legislation is limited by the constitutional guaranty against slavery and involuntary servitude.[4] No person, whether an adult or an infant, can be subjected to any sort of peonage or serfdom under the guise of an apprenticeship or hiring out.[5]

§ 89. **Informal Indentures.**—If the contract of apprenticeship has not been executed in accordance with the requirements of the prevailing statute, although there may be no provision declaring it void in such event, such contract is voidable by the infant, who is not estopped by his signature,[6] and may be released from the custody of the master upon *habeas corpus*.[7] Fraud practised by the master in their execu-

[1] Clark *v.* Goddard, 39 Ala. 164.

[2] Lally *v.* Cantwell, 40 Mo. App. 44, 49.

[3] *Infra*, § 92.

[4] Const. U. S., Amend. 13.

[5] Slaughter-House Cases, 16 Wall. 36, 69; In re Turner, Fed. Cas. 14,247; In re Sah Quah, 31 Fed. R. 327; Comas *v.* Reddish, 35 Ga. 236.

[6] Brown *v.* Whittemore, 44 N. H. 369; Hazzard *v.* Cashell, 4 Del. Ch. 30; Clark *v.* Goddard, 39 Ala. 164.

[7] Cannon *v.* Stewart, 3 Houst. (Del.) 223; C. *v.* Wilbanks, 10 S. & R. 416; C. *v.* Atkinson, 8 Phila. 375.

tion entirely avoids the indentures as against the infant.[1]

§ 90. **Same Subject.**—Although the infant may avoid such informal indentures, the other parties are bound thereby and cannot take advantage of any defects therein. It is for the infant alone to take advantage of the defects; and, if he does choose to do this, he may waive them and avail himself of the benefits of the apprenticeship.[2]

§ 91. **Nature Of Relation.**—The nature of the relation of master and apprentice is a personal one, importing service by the apprentice and maintenance and instruction by the master. The latter, in a certain measure, stands in *loco parentis* to the apprentice; but the relation created by indentures of apprenticeship does not supersede the ordinary guardianship over infants thus indentured. Thus, a master will not be permitted to object to the appointment of a probate guardian of his apprentice and is not entitled to participate in the proceedings relative to such appointment.[3] The indentures can not be assigned;[4] and the master can not remove the apprentice out of the country or state where it was contemplated he should serve, the contract having no extra-territorial operation.[5] Misconduct on the part of the master forfeits his claims.[6]

[1] Webb *v.* England, 29 Beav. 44; Mitchell *v.* McElvin, 45 Ga. 558.

[2] In re McDowle, 8 Johns. 328; Fowler *v.* Hollenbeck, 9 Barb. 309; Van Dorn *v.* Young, 13 Ib. 286; P. *v.* Gates, 43 N. Y. 40; Page *v.* Marsh, 36 N. H. 305; Lobdell *v.* Allen, 9 Gray, 377; Doane *v.* Covel, 56 Me. 527: Anderson *v.* Young, 32 S. E. Rep. 448.

[3] Wright *v.* Delano, 62 N. H. 252.

[4] *Infra*, § 95.

[5] Coventry *v.* Woodhall, Hob. 134; Randall *v.* Rotch, 12 Pick. 107; Himes *v.* Howes, 13 Metc. 80; Vickere *v.* Pierce, 12 Me. 315; Walters *v.* Morrow, 1 Houst. (Del.) 527; C. *v.* Edwards, 6 Binney, 202; C. *v.* Deacon, 6 S. & R. 526.

[6] *Infra*, § 95.

Apprenticeship had its origin in days when the various trades were encompassed with restrictions as to the person who might enter them. Modern customs, which have so greatly relaxed the rules governing the exercise of the arts and trades, have correspondingly modified the strict characteristics of apprenticeship.[1]

§ 92. **Validity Of Indentures.**—When statutes confer power upon certain tribunals or officers, such as probate courts, justices of the peace, or overseers of the poor, to apprentice minors falling within certain specified descriptions, the statutory authority must in each case be strictly pursued so far as the interests of the minor are concerned.[2] While, to a certain extent, the doctrine has been applied, that the validity of the action of such officers can not be collaterally inquired into upon *habeas corpus*,[3] yet, where there has been an abuse of process, or the proceedings of binding out have been without jurisdiction, the courts will not deem themselves precluded from inquiring into the real facts of the case and releasing an infant from an improper or injurious detention or restraint.[4] An infant is not concluded by a false or erroneous statement in regard, for example, to his age, inserted in the indentures by an official who bound him out.[5] The object of all legislation as to the binding or placing out of certain classes of children is to confer benefits upon those deemed to stand peculiarly in need of the protective care of society, and statutes

[1] Abbott, L. Dict.

[2] Harper *v.* Gilbert, 5 Cush. 417; Reidell *v.* Congdon, 16 Pick. 44; Bardwell *v.* Purrington, 107 Mass. 419; Burnham *v.* Chapman, 17 Me. 385.

[3] Brinster *v.* Compton, 68 Ala. 299.

[4] Comas *v.* Reddish, 35 Ga. 236; Adams *v.* Adams, 36 Ib. 236; Alfred *v.* McKay, Ib. 440; Hatcher *v.* Cutts, 42 Ib. 616.

[5] Banks *v.* Metcalfe, 1 Wheeler Cr. Cas. (N. Y.) 381.

having this object in view should not be made the instruments of possible oppression and harm by any construction at variance with their beneficent design.

§ 93. **Proceeding Upon Habeas Corpus.**—The master can not, by means of the writ of *habeas corpus*, obtain possession or custody of his apprentice who has been legally bound to him, unless the apprentice is kept from him against his own will and himself desires to be restored or returned.[1] On the other hand, though the contract is invalid, or at least void as against the infant, he will not be compelled to leave the master and return to his parent or any other custodian against his own will.[2] Independently of the question of the validity of the contract, the courts, in disposing of the custody of an infant held or claimed as an apprentice, are governed by the cardinal rule prevailing in regard to all controversies touching the custody of infants, that the interest and welfare of the infant constitute the paramount consideration in the determination of the custody.[3]

§ 94. **Other Proceedings And Remedies.**—The master's remedy for a violation of the indentures is by a suit on the covenants thereof, or by application to the proper court to discharge the indentures. The master can not turn away his apprentice, even though the latter be guilty of serious misconduct.[4] The apprentice can not be coerced into remaining with the

[1] R. *v.* Reynolds, 6 T. R. 497; R. *v.* Edwards, 7 Ib. 745; Exp. Grocot, 5 D. & R. 610; Lea *v.* White, 4 Sneed (Tenn.), 73; C. *v.* Robinson, 1 S. & R. 353; C. *v.* Moore, 1 Ashm. (Pa.) 123.

[2] In re Goodenough, 19 Wis. 274; In re McDowle, 8 Johns. 328; P. *v.* Weissenbach, 60 N. Y. 385; C. *v.* Hamilton, 6 Mass. 273.

[3] In re Goodenough, *supra;* Brinster *v.* Compton, 68 Ala. 299; P. *v.* Gates, 43 N. Y. 40; P. *v.* Weissenbach, *supra;* C. *v.* Hamilton, *supra.*

[4] Phillips *v.* Clift, 4 H. & N. 168; Powers *v.* Ware, 2 Pick. 451.

master. The law will not lend its aid by means of the writ of *habeas corpus*,[1] or any other proceeding, to compel the specific performance of a contract for personal services.[2] On the other hand, the apprentice is not only entitled to the remedy by *habeas corpus*, but may obtain relief in equity, if the master is guilty of misconduct.[3] The master, by misconduct, forfeits his claims under the indentures, and the apprentice is justified in leaving him,[4] and, if a stranger employs or harbors the apprentice, no action lies against him.[5] In Maryland, it is expressly provided by statute, that no action can be maintained in such cases.[6]

§ 95. **Termination Of Relation.**—Contracts of apprenticeship may be dissolved by the consent of all the parties thereto.[7] The relation of master and apprentice, being a personal one, is likewise terminated by the death of either of them.[8] For the same reason, an assignment of the indentures of apprenticeship without the consent of all the parties thereto is invalid and entitles the apprentice to claim his dis-

[1] *Supra*, § 93.

[2] Fry Spec. Perf., 3 ed., §§ 110-15; Arthur *v.* Oakes, 63 Fed. R. 310; In re Clark, 1 Blackf. (Ind.) 122.

[3] Graham *v.* Kinder, 11 B. Monr. (Ky.) 60.

[4] Warner *v.* Smith, 8 Conn. 14; Berry *v.* Wallace, Wright (Ohio), 657; McGrath *v.* Herndon, 4 T. B. Monr. (Ky.) 480; Coffin *v.* Bassett, 2 Pick. 356.

[5] Conant *v.* Raymond, 2 Aik. (Vt.) 243; Ayer *v.* Chase, 19 Pick 556.

[6] *Supra*, § 50.

[7] Graham *v.* Graham, 1 S. & R. 330.

[8] Baxter *v.* Burfield, 2 Str. 1266; C. *v.* King, 4 S. & R. 109; Cochran *v.* Davis, 5 Litt. (Ky.) 118. *Cf.* Phelps *v.* Culver, 6 Vt. 340.

charge.[1] The relation may likewise become dissolved through acts of misconduct on the part of the master,[2] or through a cancellation of the indentures by a court or other appropriate tribunal.

[1] C. *v.* King, *supra;* Martin *v.* Rice, 2 P. A. Browne (Pa.) 191; Davis *v.* Coburn, 8 Mass. 299; Ayer *v.* Chase, 19 Pick. 556; Guilderland *v.* Knox, 5 Cow. 363; Nickerson *v.* Howard, 19 Johns. 113; Stringfield *v.* Heiskell, 2 Yerg. (Tenn.) 546; Stewart *v.* Rickets, 2 Humph. (Tenn.) 151; Allison *v.* Norwood, Busb. (N. C.) L. 414; Futrell *v.* Vann, 8 Ired. (N. C.) L. 402; Biggs *v.* Harris, 64 N. C. 413; Hudnut *v.* Bullock, 3 A. K. Marsh. (Ky.) 299.

[2] *Supra*, § 94.

## CHAPTER 9

### JUVENILE INSTITUTIONS

§ 96. **Commitments Classed.**—The law relating to the commitment of minors to various juvenile institutions is entirely statutory. Such commitments may be distinguished into three classes—commitments as a punishment for crime, commitments where the proceeding is *quasi* criminal and commitments for care and guardianship.[1]

§ 97. **Commitments For Crime.**—Statutes authorizing the commitment of juvenile offenders to houses of refuge and juvenile reformatories, instead of ordinary prisons, obtain in most, if not all, states.[2] Juvenile offenders against Federal laws may likewise be sentenced to houses of refuge or juvenile reformatories instead of ordinary prisons.[3] Such statutes must receive the same construction as other penal statutes When the object of restraint or imprisonment in any institution is punishment for crime, a minor can not be proceeded against or committed without the observance of all the regular formalities of criminal procedure. The constitutional guaranties of jury trial, due process of law and the like apply with equal force in these cases as in the case of adult offenders. It was, therefore, held that a statute purporting to give inferior tribunals, not provided with a jury, power to hear and determine, in the case of juvenile offenders, accusations the trial of which must, under a constitu-

[1] In re Knowack, 158 N. Y. 482.

[2] Such legislation held to be constitutional. P. v. State Reformatory, 148 Ill. 413.

[3] U. S. Rev. Stats. §§ 5548-50.

tional provision, be by jury is void.[1] So a statute purporting to authorize a justice of the peace to commit to an industrial school a minor, upon a complaint charging him with a crime with respect to which the jurisdiction of such officer extends only to conducting a preliminary hearing was held void, as conflicting with a constitutional provision guaranteeing a trial by jury.[2]

§ 98. **Quasi Criminal Commitments.**—Statutory provisions obtain in a number of states authorizing the commitment of minors to reformatory institutions upon application and complaint of parents or guardians, made before some subordinate magistrate, charging that the minor is incorrigible and beyond domestic control. The object of the detention in these cases is, not punishment, but reform and moral training, and proceedings under statutes authorizing such commitments are held valid upon the ground, that the *parens patriæ*, or sovereign right to care for the education and welfare of its members, belongs of strict right to the state, under whose sanction the immediate charge or custody of the minor is thus transferred from the guardian who declares his inability to fulfil the purposes of the guardianship.[3] The design of such legislation is legitimate and beneficial; but, when parents or guardians voluntarily come forward and make application to have children whose care devolves upon them virtually placed within prison walls for alleged "incorrigibility," great care should be exercised in order to ascertain, whether circumstances really warrant such course. An abuse of the process of tribunals having jurisdiction to consign infants to such institutions should be jealously guarded against. In

[1] C. *v.* Horregan, 127 Mass. 450.

[2] S. *v.* Ray, 63 N. H. 406.

[3] Exp. Crouse, 4 Whart. 9; C. *v.* McKeagy, 1 Ashm. (Pa.) 248; Roth *v.* House of Refuge, 31 Md. 329.

the construction of the powers of commitment in such cases and in the conduct of the entire proceedings thereunder, the rights and interests of the infant whose condition is at stake must be duly guarded and protected.[1] If the charge of "incorrigibility" appears to be not merely unfounded, but grounded in malice or ill-will, this circumstance may in itself furnish ground for a removal of the child from the control of the complaining parent or guardian by commitment to some proper juvenile home or shelter, or a transfer of the custody to some suitable individual willing to care for the child.

§ 99. **Commitments For Care And Guardianship.**—The uniform doctrine of the courts is, that whenever such course is rendered necessary or requisite to their moral and future welfare, the commitment of minors to houses of refuge and other juvenile asylums or institutions may be authorized by summary proceeding; that, upon the same principle which recognizes the right of the courts of a state, by virtue of their general powers, to interfere for the protection and care of children,[2] the legislature may prescribe the cases in which children shall be rescued from improper surroundings and a mode provided for their summary disposition.[3] Legislatures not only have the power to make such provisions, but the duty of a state, in its character of *parens patriæ*, to protect and

[1] C. *v.* McKeagy, *supra;* S. *v.* Brown, 47 Minn. 472.

[2] *Supra*, §§ 23, 52.

[3] Exp. Crouse, 4 Whart. 9; Roth *v.* House of Refuge, 31 Md. 329; Milwaukee School *v.* Supervisors, 40 Wis. 528; Prescott *v.* S., 19 O. St. 184; House of Refuge *v.* Ryan, 37 Ib. 197; In re Kruse, 2 Cinn. Sup. Ct. R. 71; Farnham *v.* Pierce, 141 Mass. 203; In re Kelly, 152 Ib. 453; Reynolds *v.* Howe, 51 Conn. 473; Whalen *v.* Olmstead, 61 Ib. 263; Exp. Ah Peen, 51 Cal. 280; Exp. Liddell, 93 Ib. 653; Exp. Nicholls, 110 Ib. 651; In re Ferrier, 103 Ill. 367; McLean *v.* Humphreys, 104 Ib. 378; Jarrard *v.* S., 116 Ind. 98.

provide for the comfort and well-being of such of its citizens as, by reason of defective understanding or other misfortune, infirmity or incapacity, are unable to take care of themselves is regarded as a high and imperative one; the performance of this duty is justly regarded as one of the most important governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise.[1]

In an earlier Illinois case, a statute authorizing the commitment of destitute minors to reformatories was declared unconstitutional, upon the ground, that under its terms, the children so committed were virtually treated as criminals.[2] A subsequent statute was held to be free from this objection.[3] In a still later case,[4] it was held, that the claim, that a statute of this description is not so well guarded, in some respects, as it might be, with a view of preventing abuses, is a matter that addresses itself to the legislative, rather than the judicial, department of government and affords no ground for declaring the act unconstitutional.

§ 100. **Construction Of Statutes.**—The tendency of the courts, in construing the powers of committing magistrates and other officials empowered by statutes to place minors in juvenile institutions for care and guardianship and in passing upon their proceedings, is to disregard mere technicalities, giving such interpretation to the statutes as to carry out their benevolent design and sustaining the proceeding in pursuance thereof, whenever such course is evidently to

[1] McLean *v.* Humphreys, *supra*. *Cf.* Mormon Church *v.* U. S., 136 U. S. 1, 57.

[2] P. *v.* Turner, 55 Ill. 280.

[3] In re Ferrier, *supra*.

[4] McLean *v.* Humphreys, *supra*.

the advantage of the child concerned.[1] Proceedings under such statutes must, however, show that due regard was had to the rights of the child, and there must be no serious departure from the statutory requirements.[2]

§ 101. **Review Of Commitments.**—Nothwithstanding the fact, that a commitment to a juvenile institution is regular in form, the courts may, in a *habeas corpus* proceeding, inquire into the existence of a sufficient cause for detention,[3] even though a statute should expressly prohibit such inquiry.[4] The mere question as to the powers of the institution to which a child was committed can not, however, be inquired into upon *habeas corpus*. If the custody of the institution is beneficial to the child, such custody is deemed a proper one, and the question of charter powers is immaterial.[5]

In New York the doctrine prevails, that the commitment of a minor to a juvenile institution is to be regarded as a judgment, not to be impeached or questioned collaterally, so that the existence of sufficient cause therefor may not be inquired into upon *habeas corpus*;[6] but *courts of chancery* may, under their general powers over infants, remove a child from an

[1] In re Barre, 14 Abb. Pr. N. S. 426; North Pacific Board *v.* Ah Won, 18 Or. 339; Whalen *v.* Olmstead, 61 Conn. 263.

[2] P. *v.* Catholic Protectory, 106 N. Y. 604; P. *v.* House of Good Shepherd, 44 Hun, 526; In re Heery, 51 Ib. 372; Hibbard *v.* Bridges, 76 Me. 324; Goodchild *v.* Foster, 51 Mich. 599. *Cf.* Ballenger *v.* McLain, 54 Ga. 159.

[3] Prescott *v.* S., 19 O. St. 184; House of Refuge *v.* Ryan, 37 Ib. 197; In re Kruse, 2 Cinn. Sup. Ct. R. 71.

[4] Prescott *v.* S., *supra;* Cannon *v.* Stuart, 3 Houst. (Del.) 228.

[5] Hunter *v.* Dowdy, 100 Ga. 644.

[6] P. *v.* St. Dominick, 34 Hun, 633; In re Donohue, 1 Abb. New. Cas. 1; S. C., 52 How. Pr. 251; P. *v.* Catholic Protectory, 106 N. Y. 604; P. *v.* P. E. House of Mercy, 128 Ib. 180.

institution to which it has been legally committed, if such course is for the child's benefit.[1]

§ 102. **Same Subject.**—In Maryland, it is expressly declared by statute, that commitments to juvenile institutions may be reviewed at any time upon *habeas corpus*.[2] There would seem to be slight room for doubt, that this is the sound and just policy. The sole object in committing a boy or girl to a juvenile institution, the only ground upon which his or her detention therein can be justified—except, of course, in the case of juvenile offenders in reformatories—is, that it is necessary for the child's welfare. Such commitment is simply a method by which the government extends to infants without proper care and guardianship that protection which their unfortunate situation demands. If, however, through error of any sort on the part of a subordinate magistrate, a child was thus committed, when there was no real necessity or justification for such course, the mere circumstance, that the warrant of commitment is in correct form should prove no bar to an investigation of the facts by an impartial tribunal. If the commitment is procured—as happens not too infrequently—through the misrepresentation of persons who, from interested or spiteful motives, desire the child's confinement, the injustice of making the detention to depend upon the formality of the commitment is still greater. If there was ground for the commitment when made, but matters subsequently arising have rendered the detention no longer necessary or beneficial, justice and humanity alike demand, that there should be an authority vested in some intelligent and impartial tribunal to decree a release. A consideration of the inconvenience to which officials of institutions may be subjected by having to attend court

[1] In re Knowack, 158 N. Y. 482.

[2] Code P. G. L., art. 42, sec. 19.

should not be permitted to weigh in the scale against the hardship and wrong of condemning an innocent child to spend his early years as a virtual prisoner. Neither should the matter of discharge be left to the mere discretion of the officers of these institutions. The judgments of even very benevolent and humane persons are apt to be narrow or warped upon some matters, and the genius of our law demands the interposition of a judicial investigation by an impartial tribunal in every matter of private right.

§ 103. **Surrender Of Custody.**—A parent or guardian can not legally commit his child or ward to a juvenile institution in the sense of transferring or assigning his guardianship; but, when there has been a voluntary transfer of the custody to such an institution, the courts may refuse to alter or restore the custody upon grounds connected with the interests and welfare of the child.[1] Statutes authorizing the surrender by parents and others, incapable of caring for them, of children to juvenile institutions have been enacted in a number of states. Such statutes should receive a fair and liberal construction, so as effectually to carry out their humane provisions;[2] but no such construction or course of ruling should be adopted as would result in the detention of a child upon any other grounds than those connected with its interest and welfare, more especially in cases where there has been a mere temporary relinquishment of custody.[3] Such legislation, wholly beneficent in its design, should not be made an instrument of oppression or hardship. On the other hand, where there has been a surrender of the custody of a child to a juvenile institution, even though there may be no strict legal warrant under the corporate powers to receive chil-

[1] *Supra*, § 18.
[2] P. *v.* Kearney, 31 Barb. 430.
[3] Wishard *v.* Medaris, 88 Ind. 168.

dren in that particular manner, yet, if the managers are willing to care for the child and its interests would be promoted by being left in such care, the mere question of the powers of the institution to receive the child under the provisions of its charter is immaterial in any proceeding affecting the custody.[1]

§ 104. **Rights Of Institutions.**—Where children committed to the care of a juvenile institution are by it placed out in a family under a stipulation, that the institution retains control and supervision of them and may retake them, if deemed expedient by the officers of the institution, such stipulation will be enforced by the courts in a *habeas corpus* proceeding.[2]

Reasonable regulations may be made by the officers of such institutions, in order to enable them to carry out their work efficiently. Thus, in some institutions it is a rule, that the abode of children for whom homes have been found shall not be disclosed, to their relatives. In such cases, the writ of *habeas corpus* can not be used as a means merely to compel the officers to disclose where they have placed children. If the court has satisfied itself, that a child's surroundings are suitable and safe, it will not compel a discovery for the benefit of the person suing out the writ.[3]

§ 105. **Liability To Suit.**—Institutions of the class under consideration are charitable corporations.[4] They are, therefore, not ordinarily liable in actions for torts, *e. g.*, such as an assault committed by one of the officers upon an inmate of the institution.[5] If

[1] Hunter *v.* Dowdy, 100 Ga. 644.

[2] Milligan *v.* S., 97 Ind. 355.

[3] Dumain *v.* Gwynne, 10 Allen, 270; In re Larson, 31 Hun, 539.

[4] Jackson *v.* Phillips, 14 Allen, 539, 556; McDonald *v.* Hospital, 120 Mass. 432; Massachusetts Society *v.* Boston, 142 Ib. 27.

[5] Perry *v.* House of Refuge, 63 Md. 20; Williamson *v.* Industrial School, 95 Ky. 251.

charity trustees are guilty of a wrongful act, a person thereby injured has no right to be indemnified out of the trust fund.[1] The liability of such institutions can extend no farther than for the want of proper care on the part of the managers in the selection of subordinate agents.[2]

[1] Duncan *v.* Findlater, 6 Cl. & F. 507; Heriot's Hospital *v.* Ross, 12 Ib. 507; Holliday *v.* St. Leonards, 11 C. B. N. S. 192; Mersey Docks Trustees *v.* Gibbs, L. R. 1 H. L. 93; Reg. *v.* Williams, 9 App. Cas. 418; Gilbert *v.* Trinity House, 17 Q. B. D. 795.

[2] Union Rwy. *v.* Artist, 60 Fed. R. 365; McDonald *v.* Hospital, *supra;* Benton *v.* Hospital, 140 Mass. 13; Boyd *v.* Insurance Patrol, 113 Pa. St. 269; Fire Ins. Patrol *v.* Boyd, 120 Ib. 624; Downs *v.* Hospital, 101 Mich. 555. *Contra:* Glavin *v.* Hospital, 12 R. I. 411.

# APPENDIX

## FORMS AND PRECEDENTS

### 1. Petition For Writ Of Habeas Corpus

To the (*inserting style of court*):

The petition of A. B. respectfully shows, that he (or, *your petitioner's infant son, B. B.*) is illegally restrained of his liberty by C. D., at (*designating place*).

Wherefore your petitioner prays, that the writ of *habeas corpus* be ordered to issue, directed to said C. D., commanding him to produce before this Honorable Court the body of your petitioner (or, *said B. B.*), to abide such direction as may be given in the premises.

### 2. Another Form Of Petition

[If there is reason to apprehend an attempt to evade the writ, and it is desired to have inserted therein a special clause commanding the sheriff to enforce a proper return, allegations somewhat as follows may be used.]

Your petitioner further alleges, that said C. D. is about to remove said B. B. out of the State, for the purpose of evading the writ of *habeas corpus*, having declared his intention to that effect and made preparations to such end.

Wherefore your petitioner prays, that the writ of *habeas corpus* be ordered to issue, directed to said C. D., commanding him to produce before this Honorable Court the body of said B. B., to abide such direction

as may be given in the premises, and that there be inserted in the writ a clause commanding the sheriff to serve the same and to cause said C. D. immediately to be and appear before this Honorable Court with said B. B.

### 3. Affidavit To Petition

State of , County, to wit:

On this day of , 19 , before the subscriber, a justice of the peace for said County, personally appeared A. B. and made oath that the allegations of the foregoing petition are true.

### 4. Order For Writ

Let writ issue as prayed, returnable immediately (or, *at a specified time*).

### 5. Writ Of Habeas Corpus

The State of to C. D.:

You are commanded to have the body of A. B., detained in your custody, as it is said, together with the cause of his detention, by whatsoever name he be called, before (*inserting style of court*) immediately after receipt of this writ (or, *at a specified time*), to submit to and receive what shall be considered and determined in that behalf; and have you there this writ.

Witness (*inserting proper teste*).

### 6. Clause Directed To Sheriff

To the Sheriff of County:

You are commanded to serve the foregoing writ on C. D. and to cause said C. D. immediately to be and appear before (*inserting style of court*) together with said A. B.

### 7. Writ Directed To Sheriff

To the Sheriff of County:

You are commanded, A. B., by C. D., at , imprisoned and detained, as it is said, to take and bring before (*inserting style of court*), immediately upon receipt of this writ, to be dealt with according to law, and to summon said C. D. then there to appear and show cause of detaining said A. B.; and have you there this writ.

### 8. Certificate Of Service

I certify, that on the day of , 19 , I served the writ of which the within (or, *annexed*) is a copy on A. B., to whom the same is directed, by delivering it to him in person at (*e. g.*) his residence in County.

### 9. Warrant To Sheriff

To the Sheriff of County:

Whereas complaint has been made, that A. B. is illegally detained and imprisoned by C. D. and it has been satisfactorily shown, that there is reason to apprehend, that said A. B. will be carried out of the State before he can be relieved by the issue of the writ of *habeas corpus*, you are, therefore, commanded forthwith to take said A. B. and bring him before (*inserting style of court*), to be dealt with according to law.

### 10. General Form Of Return

To the (*inserting style of court*):

I produce the body of A. B., as by the within (or, *annexed*) writ commanded, and I certify, that (*stating cause of detention*).

### 11. Statement Denying Custody

That the said A. B., therein named, is not now, nor was, at the time of the issuing of the said writ, nor, at any time since, has been, in the custody, power or possession of, or confined or restrained of his liberty by, the respondent, so that he can not produce the body of the said A. B.

### 12. Statement Where Child Not Produced

That the said A. B. is now so sick (or, *infirm*), that the production of him would endanger his life (or *health*), and for this reason I do not produce him here.

### 13. Statement Denying Restraint

That the said A. B. is not imprisoned, detained or restrained of his liberty, or held in any custody against his will, by or under the control or direction of this respondent, or otherwise, but remains with the respondent of the free-will of the said A. B. and from affection to the respondent. (*1 Duer, 710.*)

### 14. Statement Alleging Commitment

That the cause of detention of the said A. B. is a warrant of commitment herewith produced, a copy whereof is hereunto annexed.

### 15. Statement Alleging Unfitness Of Relator

That the said A. B. is detained by and under the protection and care of this respondent, at his residence in the City of , for the purpose of being educated and maintained, she having sought refuge with the respondent, in order to escape from the cruel treatment of her father, the relator, who is an unfit person to have or exercise control over her, and whose custody of the said A. B. would be inconsistent with her welfare.

### 16. Special Form Of Return By Officer Of Humane Society

I certify, that E. K., named in the within writ and here produced, is an infant having no proper care or guardianship and held in my custody as agent of the Humane Society, pending the selection of a proper custody and place of abode for her.

### 17. Traverse Of Return

The said A. B., in answer to the return of the said C. D., denies that (*setting forth matter denied*), and avers that (*setting forth new affirmative matter*).

### 18. Order Of Court

"And now, 14th November, 1840, this cause having been heard upon the returns and amended return, suggestions and further suggestions, filed by the respective parties and remaining of record, and upon the evidence, written and oral, adduced before the court, it is considered, that the within-named infant, Frederick Sears Grand D'Hauteville, is not unlawfully restrained of his liberty or detained by the parties to whom the within writ is directed, or any or either of them, and that the said infant be remanded and restored to the custody of his mother, Ellen Sears Grand D'Hauteville." (*3 L. R. 314.*)

### 19. Order Containing Injunction

"In the case of Ivory K. Maxwell, petitioner for the writ of *habeas corpus*, by which the persons of Elizabeth M. Maxwell, aged three years, and Mary T. Maxwell, aged eleven months, children of the said Ivory K. Maxwell, are before the court. The court, having considered the petition of the said Ivory K.

Maxwell, the answer of Mary H. Maxwell, his wife, the mother of said children, and [that] of Daniel Mann disclaiming the right of custody of said children or either of them, and the various suggestions and proofs therein, do thereupon order, that the said Elizabeth Maxwell and Mary T. Maxwell, the said described children, be remanded to the custody of Mary H. Maxwell, their mother, and that the said Ivory K. Maxwell be enjoined and prohibited from removing the said children, or either of them, from the custody of the said Mary H. Maxwell, until the said order and injunction shall be revoked, or modified, in due course of law." (*6 L. R. 218.*)

### 20. Another Form Of Order

"The above named J. N. W. being brought up before the chancellor by Joseph T. Jackson, upon a writ of *habeas corpus* heretofore awarded in this case, and appearing to be of the age of thirteen years, or thereabout, and declaring herself to be of that age and [declaring] that she was unwilling to be delivered up to Richard Hall, on whose behalf the writ of *habeas corpus* was awarded, and that she wished to remain under the care and in the custody of her mother and Joseph T. Jackson, who married her aunt and under whom she was placed by her mother, and she appearing to be of competent judgment to make a choice—ordered, that she be restored to the custody of Joseph T. Jackson and of her mother, Sally W." (*4 Johns. Ch. 83.*)

### 21. Order Retaining Jurisdiction

"And now, February 7th, 1880, it is ordered by the court, that the minor, Charles Hart, Jr., be remanded into the custody of his mother, Louisa Hart, there to remain, until the further order of the court, the

writ of *habeas corpus* to stand open as a pending writ, subject to such further action as may hereafter be adjudged by the court to be right and proper in relation to the custody of said minor." (*8 W. N. C. 162.*)

22. Another Form Of Order Retaining Jurisdiction

"Ordered by the court, this 24th day of February, 1891, that Rose S., the infant named in these proceedings, be and she is hereby confided and committed to the care and custody of the Rev. Thomas L., until the further order of the court in the premises, the court retaining jurisdiction of said minor, for the purpose of passing such other and further orders in relation to her care and custody as may be deemed just and beneficial."

"It is further ordered, that the said L. produce the said infant to the judge of this court during the month of February in each year, so that the court may inquire as to her welfare and happiness."

"It is further ordered, that the relator P. pay the costs of this proceeding up to this time accrued."

23. Form Of Order Generally Used In Maryland

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|---|---|
| State of Maryland,<br>*ex rel.* A. B.<br>*vs.*<br>C. D. | In the<br>Court of Common Pleas |

Ordered, this——day of———,19—, that E. F., the infant named in these proceedings, be and he is hereby restored to the care and custody of the respondent (or, *confided to the care and custody of the relator*, or *some designated third party*), the court retaining jurisdiction over said infant, the relator (*respondent*) to pay the costs of this proceeding.

### 24. Clause In Divorce Decree

Ordered, that the plaintiff be awarded and charged with the custody, care and education of the infant son of the parties in these proceedings mentioned—provided, always, that this order may, at any time hereafter, be modified, varied or annulled, upon sufficient cause shown; and it is further ordered, that the defendant pay to the plaintiff———dollars a year, to be computed from the date of this decree, in half yearly payments, to be applied towards the support and maintenance of the plaintiff and her son, this allowance to continue until further order, subject to variation, as circumstances may hereafter require.

### 25. Decree As To Care And Education

"It is accordingly declared, that the right and power of directing the education of Abraham Van Houten, the infant, is by the last will and testament of Abraham Van Houten, deceased, vested in his executors, and that they are entitled to the custody of his person, so far as is necessary and proper for the purposes of education; and it is ordered, that the said infant shall, at no time, be taken out of the jurisdiction of this court, unless by the consent of the mother or the leave of the court; that the mother shall, at all times, have free access to him, and, when not at school, he shall be under her care; that he be not removed from his present school, without a reference to the master; and that all parties be at liberty to apply to the court for direction."

### 26. Warrant For Minor.

State of , County, to wit:

To any peace officer of said County:

Whereas complaint has been made before the subscriber, a justice of the peace for said County, upon

the information and oath of A. B., that C. D. is a minor without any proper place of abode or any proper guardianship, (or, *neglected*, or, *ill-treated, by his parents*, or, *guardian*, or, *custodian;* or, *whose parent*, or, *guardian*, or, *custodian, by reason of excessive poverty is unable to support and care for him*)—you are, therefore, commanded forthwith to take the said A. B. and bring him before me, to be dealt with according to law; and have you there this warrant.

Dated, this day of , 19

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### 27. Commitment Of Minor

State of , County, to wit:

To the (*designating proper officer or institution*):

You are hereby empowered and directed to receive A. B., a minor duly found to be without any proper place of abode or proper guardianship (or *otherwise, as in preceding form*), committed to be kept and retained under your care, guardianship and custody, subject to the discipline, regulations and powers of said institution.

Witness the subscriber, a justice of the peace for said County, this day of , 19

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### 28. Order For Attachment

A writ of *habeas corpus* having been issued, commanding the above-named A. B. to produce in court the body of C. D., an infant alleged to be illegally detained by him, and the court having ascertained, upon sufficient inquiry and proof, that said writ was duly served upon said A. B., and said A. B. having wholly omitted to obey said writ and being thus in contempt, it is, this day of , 19 , ordered that attachment issue against said A. B., to answer said contempt.

### 29. Special Form Of Order For Attachment

Ordered, that an attachment of contempt issue against A. B. for not producing the body of C. D., but that the same be accompanied with a copy of this rule, which is to operate as instruction to the sheriff, not to serve the same, if said A. B. shall forthwith, upon service of a copy of this rule upon him, release said C. D., or cause him to be brought before the court in obedience to the writ of *habeas corpus* issued in this cause. (*Adapted from In re Stacy, 10 Johns. 328.*)

### 30. Attachment Of Contempt

State of , to wit:
To the Sheriff of County:
You are commanded to apprehend and bring before (*inserting style of court*) A. B., to answer a contempt by him committed.
Witness (*inserting proper teste*).

### 31. Order Of Commitment For Contempt

Ordered, this day of , 19 , that A. B. is adjudged guilty of contempt in (*setting forth facts*) and that he stand committed to jail, until he purge himself of such contempt.

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